S. HRG. 98-583

COMPETITION IN TELEVISION PRODUCTION ACT

HEARINGS

BEFORE THE

SUBCOMMITTEE ON COMMUNICATIONS

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

FIRST SESSION

ON

S. 1707

TO PROVIDE A MORATORIUM UNTIL JUNE 30, 1988, ON CHANGES TO THE FEDERAL COMMUNICATIONS COMMISSION RULES REGARDING NETWORK TELEVISION SYNDICATION, NETWORK TELEVISION FINANCIAL INTERESTS, AND PRIME TIME ACCESS

NOVEMBER 2 AND 4, 1983

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COMPETITION IN TELEVISION PRODUCTION ACT

WEDNESDAY, NOVEMBER 2, 1983

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
SUBCOMMITTEE ON COMMUNICATIONS,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:30 a.m., in room SR-325, Russell Senate Office Building (Hon. Barry M. Goldwater) presiding.

Staff members assigned to these hearings: Dan Phythyon and Cindy Douglass, staff counsels and Cheryl Wallace, minority staff counsel.

OPENING STATEMENT BY SENATOR GOLDWATER

Senator GOLDWATER. The meeting will come to order.

Before I start I might explain to the witnesses that we have three little lights up here. They work most of the time. When it is green, you can talk. When it is yellow, you ought to begin thinking about quitting. And when it is red, you are supposed to shut up. But I have bad eyesight, and sometimes I do not see it.

The committee is assembled today to hear testimony on S. 1707, the Competition in Television Production Act. This bill was introduced on July 29 by Senator Pete Wilson of California and cosponsored by nine other Senators, including myself. A companion bill in the House of Representatives, H.R. 2250, has over 130 cosponsors.

The purpose of S. 1707 is simple: To prohibit the Federal Communications Commission from taking any action prior to July 1, 1988 to repeal or modify any of three of its present rules relating to the ownership and distribution of television programs. These are commonly known as the financial interest, syndication, and prime time access rules.

The FCC has proposed to repeal the financial interest rule and to substantially alter the syndication rule.

Yesterday, the full House Commerce Committee approved a 6-month moratorium on any FCC action to modify these rules. Last Thursday the full Senate passed the supplemental appropriations bill containing a similar provision that would prohibit the FCC from using any funds to repeal or modify these rules through May 31, 1984.

In brief, the FCC syndication rule prohibits the three national television networks—CBS, ABC, and NBC—from engaging in the

business of syndicating television programs that initially aired on a network to other television stations.

The financial interest rule prohibits the networks from acquiring any ownership interest in programs other than those produced by the network itself. The prime time access rule preserves a half hour of the 7:30 to 11 Eastern time prime time viewing period for nonnetwork, independently provided programs.

Now, I will interject here that this opening statement is a trifle longer than I usually make, but this is a subject that I do not know very much about, and I have to depend on you and depend upon the witnesses and upon what I read.

The FCC adopted these three rules in 1970 after an unusually lengthy inquiry into the conduct and practices of the three television networks and the development, acquisition, exhibition, and subsequent syndication of television programs that appear on the networks. In fact, in a real sense the rules were an outgrowth of a 1952 FCC decision that allocated more than 2 VHF television channels in only 27 of 50 of the most populous markets in the United States.

In practical effect this decision, issued while television was still in its infancy, ordained that no more than three television networks with outlets in most major cities across the country could economically be developed. Thus, the industry has never operated under purely natural market conditions.

The three networks have also entered into consent decrees with the Department of Justice to settle antitrust complaints filed against the networks. The NBC consent decree was entered by the district court in 1978, and the CBS and ABC decrees were entered in 1980.

These decrees impose several restrictions on network practices. However, the Justice Department is considering proposals to modify or even vacate the provisions of the consent decrees.

In 1980 a report by the FCC-commissioned network inquiry special staff questioned the effectiveness of the three rules and recommended their repeal. After the filing of hundreds of public documents and reply comments, on August 4 of this year the FCC by a divided vote adopted a tentative decision that would retain the prime time access rule, repeal the financial interest rule and replace the syndication prohibition with a very narrow rule which itself would expire in August 1990.

The rule would allow the networks to acquire and exercise syndication rights to the entire foreign syndication market and to all of the domestic syndication market, including first run syndication programs, miniseries and other prime time shows, except only prime time entertainment series of at least 22 episodes.

Also, networks would be allowed to obtain so-called passive profit-sharing interest up to 100 percent even in these prime time entertainment series.

The FCC tentative decision also says that networks can acquire the syndication rights to these prime time series, but must sell or otherwise transfer the syndication rights within 5 years after any series began its run, or within 6 months after a series has dropped from prime time viewing, whichever comes first.

S. 1707 would prohibit the FCC from repealing or changing either the financial interest and syndication rules or the prime time access rule until July 1988.

Now, the sponsors of S. 1707 believe that the new media and more competitive television marketplace predicted by some observers have not yet actually developed, and in fact may never develop to the point where the networks' domination of the American television marketplace is removed.

Even the most pessimistic predictions by industry analysts foresee that the three networks combined will retain a strong majority share of prime time viewing as late as 1990. The subcommittee is interested today in hearing whether or not witnesses believe it is advisable to free the networks from virtually all of these restrictions now as the FCC proposes, or whether the rules help to increase competition and diversity in television broadcasting and in program production and should be retained, at least for a limited time, in order to permit further study and further actual experience with the changing television marketplace.

How successful will pay television be 5 years from now? Has it already peaked? Will multipoint distribution service grow or stay at less than 1 percent of TV households? What is the future of direct broadcast satellites? Will the basic cable companies be able to recover from recent rating losses and slow growth and added spending, and if so, what kind of market will cable represent for producers of original series programs?

Even if the new media buys movies and musical productions, is this relevant to the unique needs of independent television stations to exhibit off-network entertainment series? And even if rentals of video cassettes and disks may constitute a growing new market, how does this development strengthen movie or entertainment producers who receive no share of these rentals?

If the FCC itself believes there is such a serious threat of the concentration of power in the networks that it is necessary to impose a prohibition on direct network syndication of prime time entertainment series for 7 more years, how can the Commission or the public have any confidence?

The same threat of concentration or overwhelming market position by the networks does not apply with equal force to other lucrative forms of syndication such as foreign and first run syndication. And if the FCC fears the power of networks so much that it believes the prime time access rule must be retained, why does the Commission not have the same fear in the case of the financial interest and syndication rules?

These are just a few of the many basic questions the subcommittee will need to address at these hearings. The witnesses who will be giving testimony before the subcommittee this morning include the author of S. 1707, Senator Wilson; representatives of some of the Federal departments and agencies that have participated in the FCC's proceeding; the three television networks who seek repeal of the rules; and the television program production industry and independent television producers and actors who favor retention of the rules.

On Friday we will hear testimony from a panel representing interguild councils, a panel of independent television stations and ad-

vertisers, a panel of network affiliates, and multiple television station owners, and two panels representing public interest communications groups, minorities, the elderly, and labor.

And that constitutes my opening remarks, and as I said before, this is a very, very difficult, a very complicated field. It is the type of field that we very, very rarely enter into in the Communications Subcommittee, mainly because we do not know enough about this from the free market standpoint.

We like to think that things in this country operate under the free market standards, the ability of both sides to get together. And it is always, in my mind, unfortunate when the Federal Government has to get itself into anything.

But with those remarks, I am going to ask the Honorable Pete Wilson of California, who is the author of this bill, to testify, and then he will be followed by Hon. Mark Fowler, who as we all know is Chairman of the FCC. First, however, I believe that Senator Packwood, chairman of the full committee, has an opening statement.

OPENING STATEMENT BY THE CHAIRMAN

The CHAIRMAN. Mr. Chairman, it seems to me there are really only two issues involved in this battle, and I think any of us at this committee table, any of us in this room know what the real issues are.

For this committee the two major issues we ought to face are the following: One, is this a battle of David versus Goliath, that despite the outcome of that particular battle, David needs protection? Is this a battle between the bigs and the smalls, so disparate in power that the smalls must be protected?

Now, if the answer to that is yes, this Government, for the better part of its history, has had a history of protecting small business, of enforcing the antitrust laws, when we found that bargaining power was disparate.

Second, there is the issue of the quality of television programing. I do, however, have grave misgivings about the Federal Government attempting to impose its judgment as to what should be quality television programing.

Apart from those misgivings, however, the issue can be raised about whether the public is better served. Do they get programs that they like better, or do they at least get the programs that they ought to get, apparently in our judgment?

From the present situation with the rules, is the quality of programing as good now but not better than it was prior to the adoption of the rules?

Those are the only two issues. If the public is going to be as well served with or without the rules in terms of what they get to view, then the rules should fall on that basis.

Second, if it cannot be shown that the bargaining powers of the parties involved in this are so different that the parties need protection, then the rules should fall on that basis.

Thank you, Mr. Chairman.

Senator STEVENS. Mr. Chairman, I have to leave, and I want to make a little comment, too, if I may.

Senator GOLDWATER. Well, we are so happy that you are here, and I want to thank you for that fish. You go right along.

Senator STEVENS. I am glad that you admit that bribery still works. He trades me chili for my salmon, and that is a fair trade.

OPENING STATEMENT BY SENATOR STEVENS

Senator STEVENS. Mr. Chairman, I offered the amendment in the Senate at your request to delay the FCC in its proposed repeal, and I think you were correct in asking for time to hold these hearings.

As we have approached this matter, however, it has become clear that the subject is broader than the chairman states. The real question here is to what extent should we totally repeal the regulatory framework which has given us the best telecommunications media in the world.

The FCC proposes to repeal a portion of that, and I hope that your hearing will go beyond just the proposed acts of the FCC. They propose only to repeal a portion of the rules that came about primarily as a result of the hearings that were held by the former chairman of this committee, John Pastore. I sat through those hearings with John.

And I think that we have to keep in mind that there is a rule and a tradition. We only have three networks. There is a must carry rule. There are other rules that affect the economics of this telecommunications industry beyond the ones the FCC proposes to repeal. I do not favor repeal of any of them, but I do not think we can stand by and let the FCC repeal a portion of those rules, a portion of this regulatory fabric, and then say that they are doing it in the interest of restoring competition.

I hope that this committee and I hope that the witnesses will address the necessity for all of the rules, not just those that the FCC proposes to repeal.

Thank you.

Senator GOLDWATER. I think we will allow the other members of the committee to make any statements they have at this time, and then we would proceed.

Senator Gorton.

OPENING STATEMENT BY SENATOR GORTON

Senator GORTON. Thank you, Mr. Chairman. Thank you and the chairman of the full committee for calling this hearing.

I can only start by candidly admitting that to this point I have found the case made by Senator Wilson for his position to be persuasive. I am not persuaded that by lessening regulation of the three huge networks in this business we would increase competition.

I do, of course, look forward to the testimony of all of the witnesses here, but I start from the proposition that it is unlikely that we will get broader based programing or more competition by the implementation of the rule which the FCC proposes.

Senator PRESSLER. Mr. Chairman, I have an opening statement.

Let me say that I think the real issue is how this would affect the Mrs. Murphys of this world, the mythical Mrs. Murphys of law

school fame, the typical little old lady in her house in Humboldt, S. Dak., or wherever, who watches television.

Now, here in Washington all of our offices have been visited by network executives, by representatives of big law firms, and public relations firms on both sides, and we hear about the difficulties the networks have and the difficulties the producers have.

The real issue is how this will affect Mrs. Murphy in front of her little TV in Humboldt, S. Dak. We do not have any independent stations in my State. We do not have any producers in my State. And the networks in my State do not have a very big market.

So in the testimony which I am going to hear and read, I am looking for how is this going to affect the consumer. This whole thing has taken on kind of an aura of a big lobbying battle—the Guccis versus the wing tips. It is kind of an unhealthy Washington type atmosphere that is springing up around this. Lots of stars are coming in and lots of high-powered lawyers. But what will become of Mrs. Murphy's television program? That is what I want to hear about, the quality of programing, and so forth. That is what we seem to be forgetting in this whole debate, but that is the criterion upon which I will make my decision.

Senator GOLDWATER. Thank you very much.

[The bill follows:]

[98th Congress 1st session]

S.1707

A bill provide a moratorium until June 30, 1988, on changes to the Federal Communications Commission rules regarding network television syndication, network television financial interests, and prime time access.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Competition in Television Production Act".

SEC. 2. In order to maximize competition in the television broadcasting marketplace and to promote diversity of programing sources for the public, the Federal Communciations Commission shall not have authority to take any action before July 1, 1988, to repeal, amend, or otherwise modify the provisions or applicability of any of the following:

(a) section 73.658(j)(i) of title 47, Code of Federal Regulations (commonly known as the "Syndication Rule"; 23 F.C.C. 2d 382);

(b) section 73.658(j)(ii) of title 47, Code of Federal Regulations (commonly known as the "Financial Interest Rule", 23 F.C.C. 2d 382); and

(c) section 73.658(k) of title 47, Code of Federal Regulations (commonly known as the "Prime Time Access Rule"; 23 F.C.C. 2d 382).

Senator GOLDWATER. Pete, I guess it is all yours.

STATEMENT OF HON. PETE WILSON, U.S. SENATOR FROM CALIFORNIA

Senator WILSON. Thank you very much, Mr. Chairman.

I was not only delighted to have the patience that you admonished me to have. I learned from the opening statements of my colleagues on the committee.

I am proud to ask Senator Pressler whether he is wearing Guccis or wing tips this morning.

Senator PRESSLER. These are Sioux Falls leather.

Senator WILSON. I was hoping they were mukluks.

In any case, Mr. Chairman, years ago in another incarnation as mayor I promised after an election to bring people together, and it

seems clear that I have succeeded in doing that by introducing this legislation.

As Senator Pressler has indicated, he apparently, among many other Senators, has been visited by network executives and some TV personalities, but I think really what is at stake this morning is simple fairness and competition that benefits the Mrs. Murphy that is the subject of his concern.

Mr. Chairman, I very greatly appreciate the opportunity that the Subcommittee on Communications has afforded me to testify today on S. 1707, I think appropriately titled the "Competition in Television Production Act," which I introduced July 29 and which is designed to place a 5-year moratorium on changes to the financial interest, syndication, and prime time access rules.

I am particularly pleased and honored, Mr. Chairman, to count you as one of the cosponsors of the bill, along with eight other colleagues from both sides of the aisle.

It is not startling news that the television industry is under great marketplace control by the three major television networks. They have what some term oligopsony power; that is, the power that is exerted when there are only a few large buyers comprising the total marketplace.

The result of this situation, if left unchecked, is that the sellers of television programs would be subject to undue and unfair pressures by the networks—by these limited buyers—who comprise the entire marketplace.

Now, as the subcommittee knows well, there presently exist three rules promulgated by the Federal Communications Commission in 1970 which have kept this situation in proper balance. They are known as the syndication rule, the financial interest rule, and the prime time access rule. Together they serve to insure that the networks act in a responsible, procompetitive fashion in arranging for the production and acquisition of television shows to be aired over their facilities out to their affiliates across the United States.

Prior to establishment of these rules, the networks were pretty much free to dictate the rules of television, free to produce their own programs, free to discourage competition in program production by refusing access to independent producers, and free to provide daytime reruns only when and to whom they saw fit.

If the networks wanted to contract for the production of a new show with an independent producer, they did so holding all the cards, for if a producer balked at terms of a deal which was offered, he had effectively nowhere else to turn.

Yes, there are two other networks, but, by custom and for all practical purposes, if a producer were rejected by one network, the others would also bypass him.

With this power of an oligopsony, the networks were able to negotiate favorable deals which allowed for little profit to flow to the independent producers, discouraging them, keeping them small and few in number.

Without the rules, the networks were also able to freely choose when and to whom they would provide the rights for rerunning successful prime time shows. And not surprisingly, the networks tended to wait quite a long time until the show had run during prime time for a very long time before finally doling out the most

popular shows. And when they did so, they tended to favor their own affiliates.

Should there be any doubt about what I have been telling you today, an assessment of what has happened since the implementation of the rules is instructive.

In the 1971–72 television season when the FCC rules first went into effect there were only 48 independent producers supplying programing for network prime time exhibition. By the 1981–82 season, the number had grown from 48 to 81. In 1970 there were only 65 independent television stations in the entire United States. By 1982 that number had grown from 65 to 179.

Mr. Chairman, the networks have claimed before the FCC that they are losing their market power. They contend that they are losing their market share primarily to so-called new technology. But the new technology today represents only 3 to 5 percent of the market. The networks have over 15 times as large a market share, and the networks' own projections show them maintaining a comfortable lead and an actual increase in viewership well into the 1990's.

The real competition for viewers is coming from the independent television stations, but the three networks control four times as much of the viewing market as do the 170 independent television stations.

Actually, in considering the antitrust aspects of the rules, it is important to look not just at viewership but at the market for made-for-television programing. There the networks control well over 90 percent of the market. Combine this control with the unique power that the networks have as gatekeepers of the airways for original programing, and it is apparent that they have enormous market power.

I am truly amazed when it is suggested that the rules must be lifted in order to create a level playing field upon which the networks can compete on an equal basis with the producers.

Today there are approximately 80 independent producers. If the networks are set loose, if they are released by repeal of the rules, there will be 83, but only the networks will control the airwaves. It takes little imagination to picture that network productions and the productions of their network partners, those who have been forced to give up a percentage of their ownership of their shows, these, the networks and their partners, will receive preferential treatment.

Mr. Chairman, the networks' revenues last year exceeded $6 billion. I really cannot accept the argument that the networks, and with them, free television, is in danger of disappearing from the face of the Earth.

Mr. Chairman, the FCC initiative to do away with the rules has been labeled deregulation. Those who would have the FCC abolish the rules claim that the rules supporters are out of step with the deregulatory mood of the executive branch, the Congress, and the American people.

Mr. Chairman, I contend that this assessment comes from a misunderstanding of what deregulation is all about. Deregulation is not an end in itself. Indeed, it is simply absurd to suggest that from the demise of every government regulation the American public is

better off. Deregulation is only beneficial if it serves to foster competition, for it is competition which allows market forces to work their magic and create greater choice and lower cost for the consuming public.

Now, Mr. Chairman, at this point in my statement I would like to read into the record the response from Edwin Meese III, the Counsellor to the President, to a letter which I earlier addressed to the President.

The President has asked me to respond to your letter of July 20, 1983, expressing your concern regarding the syndication and financial interest rule in the television industry. We appreciate your views and have since been in the process of examining all sides of the issue.

As you know, the President has consistently favored Government efforts to promote vigorous competition. However, he has determined in this instance in light of changing market conditions in the television and program production industries that additional review of the consequences of repeal of the rule is necessary. Accordingly, after careful consideration of this matter, the President has decided to support a 2-year legislatively mandated moratorium on any change in the syndication and financial interest rule. A 2-year moratorium would allow us to give the issue further study and monitor future changes in the marketplace, while at the same time ensuring continuing healthy competition within the industry.

Mr. Chairman, I personally think that it will be 5 years before we have had an adequate time to monitor changes in the marketplace that are occurring because of changes in technology. I hope that there will continue to be growth in competition, but at the very least I think that the President's view is certainly one that we can respect.

With the rules in place it is clear that television viewers today are enjoying more choice because there is an ever-growing pool of competition and diversity in programing. And with the rules in place there has been a genuine, significant growth in the number of nonaffiliated television stations which in turn has lowered advertising costs in competitive local markets by 20 to 60 percent, 20 to 60 percent reduction on the rate card.

Mr. Chairman, this last point is one that I learned from the Association of National Advertisers from their submission of testimony to the FCC, a document which I commend to the subcommittee's attention, because the two groups of private interest most often pictured as the main players behind the legislative scenes are the producers and the networks.

Clearly, they have the most direct financial interest in this matter, but interestingly, the group that will suffer the most significant indirect impact of the rules being abolished is the advertisers.

The advertisers very likely do not care a great deal about the issue of creative control and network dominance, at least not in the abstract. The advertisers probably do not care whether a lifting of the rules will lead to a greater concentration of power in the networks.

But what the advertisers do care about, what they must care about passionately, is whether or not there are good television shows available that people will watch and whether or not there are low advertising rates. In other words, the advertisers care about what we in Congress care about in devising antitrust and

communications policy: namely, diversity which yields creative programing, and competition which yields low costs to the consumer.

It is really quite simple. If the advertiser's costs go up, including its advertising budget, up, too, the price of the goods and services which the advertiser is offering to the consumer—Econ 1.

Mr. Chairman, the advertisers support retention of the rules for precisely that reason, because of that rate card differential in those markets where they enjoy competition between the network affiliates and the independent television stations—a competition and benefit they do not enjoy where there is not that competition because they are served only by the network affiliates.

They support retention of the rules, and the ANA, the Association of National Advertisers, filed before the FCC in opposition to changes in the rules. Again, I commend their testimony. It is most instructive.

Just this week I received a letter from one of the country's largest television advertisers, Mars, Inc., the makers of Mars candy. And I would ask, Mr. Chairman, that that letter be made part of the record.

Senator GOLDWATER. It will be.

[The letter follows:]

MARS, INC.,
McLean, Va., October 26, 1983.

Hon. PETE WILSON,
U.S. Senate, Room 720, Senate Hart Bldg., Washington, D.C.

DEAR SENATOR WILSON: Mr. Mars, who is out of the country on business, has directed that I respond to your letter of October 18, and that I write to you to express our support for your Bill S 1707, which would impose a moratorium on repeal by the Federal Communications Commission of its Financial Interest and Syndication Rules for a period of five years.

As you are aware, Mars, Incorporated manufactures a variety of products, a large amount of which is done in two locations in California, and purchases broadcast advertising time from broadcast networks and their affiliates, independent television stations, and cable operators in connection with its efforts to market its goods. National television advertising is a key component of our efforts to acquaint the consumer with the benefits of our products. As a purchaser of advertising time, we will be adversely and directly affected by the Federal Communications Commission's Tentative Decision to Repeal the Network Television Financial Interest and Syndication Rules, should the negative effects thereof to which you make reference in your letter take place.

From our review of the debate which has surrounded this action, it does appear that the FCC's Tentative Decision could tend to increase the power of the three major broadcast networks over programming. Since control over programming can, in large part, determine market shares of television viewership—the single most important determinative factor in the establishment of advertising rates—repeal of these rules could thus seem to have a direct impact on advertising rates. Repeal of the Financial Interest and Syndication Rules may enable the networks to restrict the supply of off-network programming available to independent broadcasters. In such event, networks and their affiliates would likely absorb any increase in viewership that would result from an erosion in an independent station's ratings, and could, accordingly, further increase network advertising rates.

Statistics made available by the Association of National Advertisers in their comments before the FCC in this proceeding indicate that the cost of advertising per 1,000 viewers is 20–60 percent lower in markets with strong independent stations. A diversity of broadcast outlets is possible only if such broadcasters have access to programming desirable to viewers. Diversity of outlets also increases the total amount of spot television advertising time. This, too, serves to provide an additional measure of competition that limits advertising rate increases.

We agree with the assertion that the existing Financial Interest and Syndication Rules have contributed significantly to the growth of independent television stations. It is the growth of independent stations that is the single most important benefit to the public which has been realized as a result of these rules. At a mini-

mum, the FCC's proposal to completely eliminate the Financial Interest Rule and to adopt a narrowly-focused Syndication Rule is certainly premature. The current rules have worked well to introduce a new measure of competition in the television programming business, and, commensurately, has added a dimension of competition heretofore nonexistent with regard to advertising rates. Thus, we actively support S 1707, which would impose a five-year moratorium on repeal of these rules.

Very truly yours,

HOWARD L. WALKER,
Regional President.

Senator WILSON. Mr. Chairman, much has been made of the FCC's special staff study and its importance to this debate. Unfortunately, too little attention has been devoted to the actions of the Department of Justice. Justice has been studying market concentration in the television industry since the 1950's, and only 3 years ago entered into consent decrees with the networks which go beyond the scope of the financial interest and syndication rules.

Two aspects of the consent decrees which are of some significance deserve comment here. First, they went into effect 10 years after the FCC promulgated the financial interest and syndication rules. What this means is that even with the rules in effect, the Department of Justice found the television broadcast industry to be burdened by undue market concentration, and this was ratified by a Federal court.

Second, the consent decrees were finalized at the same time as the FCC special staff produced its report recommending abolition of the rules.

I understand that the FCC has the day-to-day role of setting communications policy, but it is the Department of Justice which is assigned the task of antitrust enforcement—a role which I am troubled to say has not been pursued in a robust fashion of late. Indeed, the Senate has recently expressed its displeasure formally, attaching a resolution which had the support of more than half of the Senate to the State-Justice appropriations bill.

The resolution criticized the Department for its neglect of our antitrust statutes. I would commend the subcommittee to seek the counsel of those who were in positions of responsibility at Justice when it was pursuing the issue of market concentration during the Nixon, Ford, and Carter administrations, just as the subcommittee has today found time to schedule testimony from an individual who is responsible for the FCC staff study.

Mr. Chairman, there are some who have suggested that Congress should not become involved in the debate over network practices. They have suggested that this matter has been delegated to the FCC and that rules that the FCC put in place are properly amended or repealed only by the FCC.

I strongly disagree. The Congress has been involved in this debate since 1956 when Senator Magnuson chaired hearings held by this committee on the television industry, including 11 days devoted to network practices.

Since then, oversight and legislative hearings have been held in both Houses of the Congress. The record clearly shows that the Congress need not be shy or reluctant to grapple with these important issues of public policy.

Mr. Chairman, I was gratified when the Senate voted 57 to 32 last week to delay for 6 months further FCC final action on the fi-

nancial interest and syndication rules, and when the House Energy and Commerce Committee took the same approach just yesterday with full action expected next week.

The delay will provide the time needed for thorough consideration of this matter by this committee which has primary jurisdiction over the FCC and by the Congress.

I would suggest that at least 2 years, and I would think really 5 is necessary so that the committee can gain an insight into those very points which the chairman commented upon in his perceptive opening statement.

If there is a change in the marketplace which the networks contend is taking place, if, in fact, competition is growing, I think that is a thing which we as consumer advocates, both in terms of diversity of programing and low cost to advertisers and low cost to consumers, should celebrate.

But, Mr. Chairman, it is going to take some time before that is apparent. What is clearly apparent is that repeal of the rules at this time would foreclose developing competition, competition which cannot occur if indeed independent television stations which are providing that competition to network affiliates find themselves cut off from the kind of programing that attracts audiences and therefore advertisers.

Mr. Chairman, repeal of these rules today would restore the encompassing power of the networks, a control that has been only slightly diminished in the last decade. Frankly, it would drive out a lot of small, fledgling independent companies, drive them right out of the business.

In 5 years, Mr. Chairman, I believe we will be in a position to better assess network dominance in the television industry. If the industry is then truly competitive, the rules can be repealed.

I do not contend for 1 minute that these rules should be cast in stone or that they should last forever. I do strongly contend that they are needed today and that they will remain needed for the next few years—not only for healthy competition but also to assure a steady flow of information and entertainment to the public from diverse sources.

Perhaps 2 years will prove a long enough time. I doubt it, Mr. Chairman. Again, I think 5 years will be required. But I would suggest that the committee has the option, clearly, of agreeing with the initiative which I have reported to the committee today and the response from the White House.

At least 2 years, it seems to me, is required. Personally, I think a longer period, Mr. Chairman.

I am grateful to you and to the members of the subcommittee for your courteous attention. I know that you will give that same attention because of your interest in the subject to the witnesses who follow me. They will be able to tell you from their own experiences of the need for the retention of these rules.

Mr. Chairman, I thank you and the members of the subcommittee. I would be happy to answer any questions.

Senator GOLDWATER. Thank you, Senator Wilson.

Might I ask to impose upon your patience just once more? We would like to hear from Hon. Mark Fowler at this time, and then

the two of you will be subject to questioning from the subcommittee.

We will ask Mr. Mark Fowler, Chairman of the Federal Communications Commission, to come forward and give us a brief statement.

I am sorry. Senator Ford, do you have an opening statement you would like to make?

Senator FORD. None whatsoever, Mr. Chairman. I am interested in what the witnesses have to say.

Senator GOLDWATER. Thank you.

STATEMENT OF HON. MARK FOWLER, CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION; ACCOMPANIED BY WILLIAM JOHNSON, DEPUTY CHIEF, MASS MEDIA BUREAU; AND PETER PITSCH, CHIEF, OFFICE OF PLANS AND POLICY

Mr. FOWLER. Chairmen Packwood and Goldwater and members of the subcommittee, Senator Wilson, thank you for the opportunity to testify on Senate bill 1707. S. 1707 would prevent the Commission from making any changes to three of our rules: the financial interest rule, the syndication rule, and the prime time access rule. Changes to two of these rules—financial interest and syndication—are being considered in a rulemaking proceeding currently pending at the Commission. The third rule, prime time access, is not part of this or any other pending rulemaking. It will remain unchanged and unaffected by the proposed changes to the other two rules.

The financial interest and syndication rules were adopted by the Commission in 1970. When it adopted these rules the Commission stated that the rules could, and I quote, "readily be changed or rescinded" if they failed to achieve their intended purpose.

In fact, the rules' efficacy began to be questioned almost as soon as the rules were in place. First, shortly after the rules were adopted, independent scholars began to criticize the economic reasoning upon which the rules were based. Then in the late 1970's, as part of the comprehensive inquiry into commercial network practices, a special independent staff of the Commission questioned the rules' efficacy.

This network inquiry staff disputed much of the economic reasoning upon which the rules were based and concluded that the rules were incapable of furthering either the general goals of diversity, localism, or increased competition, or the specific goals of lessening the networks' bargaining power in acquiring programing from producers and fostering the developing of first-run syndicated programing.

Based upon this criticism, the Commission decided to reevaluate the rules and issued a Notice of Proposed Rulemaking in 1982. After an exhaustive review of the evidence, the Commission announced its tentative decision in August of this year to eliminate the financial interest rule and to retain a modified syndication rule for a period of time.

In brief, the Commission concluded that the rules as they affect relationships between networks and program suppliers fail as mechanisms to increase first-run syndication or foster competition in the program supply market. The tentative decision stated that

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to the extent the rules attempt to alter the distribution of profits among private parties, the rules make neither good economic sense nor good public policy.

The decision went on to note that this allocation has never been a proper or desirable function of the Federal Communications Commission.

The Commission also concluded, however, that there is a remote chance that the rules inure to the benefit of the independent stations—a purpose barely touched on when the rules were first adopted—by preventing the unlikely possibility that the supply of programing to independent stations could be restricted by means of an intricate, complicated warehousing scheme.

We therefore tentatively concluded that the public interest would be served by retaining a modified version of the syndication rule limited in scope to protect against warehousing and limited in time until 1990. However, because the networks' financial interest in programs has no direct relationship to the possible warehousing strategy, we found no justification for retaining even a modified version of the financial interest rule.

In the tentative decision the Commission stated that the financial interest rule has failed to increase the program supply to independents, has not improved program diversity or quality, has not decreased network control over program content or creativity, and appears to create barriers to competition in program production.

In view of the lengthy and detailed analysis we have undertaken, I believe it would be inappropriate for Congress to interpose a moratorium on further FCC consideration of these matters. A moratorium, I submit, is not needed for the Commission to compile additional information.

The record in this matter is voluminous. It has been exhaustively reviewed. Extraordinary care has been taken to insure a full understanding of the economics involved and the positions of all parties.

The Commission has proceeded in a manner to insure complete fairness with the public interest as our standard of reference. It was pursuant to our rulemaking authority that we adopted the rules and pursuant to that same authority that we are currently reevaluating them.

Given this process, we believe that the Congress should permit us to reach a final decision without further delay. That would also give Congress the benefit of having before it not a tentative decision but a final decision which it could then evaluate and make a decision as to whether it wished to modify the decision, countermand it totally, or take other actions based upon the final decision.

Accompanying me today are William Johnson, deputy chief of the Commission's Mass Media Bureau—he is on my left—and Peter Pitsch, chief of our office of plans and policy, on my right.

We would be pleased to answer any questions. I am sorry. I got them exactly backward here. They switched chairs. Bill Johnson is on my right, and Peter Pitsch is on my left, although Peter is usually to the far right.

We would be pleased to answer any questions that you all might have.

[The statement follows:]

STATEMENT OF HON. MARK S. FOWLER, CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION

Mr. Chairman and members of the Subcommittee:

INTRODUCTION

Thank you for the opportunity to testify on S. 1707, cited as the "Competition in Television Production Act." Accompanying me today is William Johnson, Deputy Chief of the Commission's Mass Media Bureau.

S. 1707 would prevent the Commission from making any changes to three of its rules: the financial interest rule, the syndication rule and the prime time access rule. Changes to two of these rules—financial interest and syndication—are being considered in a rulemaking proceeding currently pending at the Commission. The third rule—prime time access—is not part of this or any other pending rulemaking. It will remain unchanged and unaffected by our proposed changes to the other two rules.

The current financial interest and syndication rules prohibit networks from purchasing from program producers anything more than the right to televise a program over the network. Specifically, networks are prohibited from controlling or having a financial stake in the re-run syndication rights. Even in the case of a network-produced program, the networks are required to relinquish all syndication rights and interests. The Commission has proposed changes that would permit networks to negotiate for a financial interest and participation in the syndication of programs—subject to certain limitations.

Before describing the specifics of our proposal, let me briefly recount the history of our recommendation for change.

BACKGROUND OF RULES

The financial interest and syndication rules were adopted by the Commission in 1970. The Commission's analysis in adopting the rules focused on the relationship between the networks and the program producers. The rules were designed to alter the balance of economic power between them. By altering this balance it was apparently thought that the program supply industry would become more competitive and the programming exhibited on network television more diverse, that a potentially undesirable factor influencing the programs selected for network exhibition would be eliminated, and that greater stability and profitability on the part of producers would result in the creation of first-run syndicated programming that would be available to individual stations as an alternative to network programming. The Commission generally believed that these rules would promote competition and diversity in television program production and distribution.

When it adopted these rules in 1970, the Commission explicitly noted that the rules could "readily be changed or rescinded" if they failed to achieve their intended purpose. In fact, the rules' efficacy began to be questioned almost as soon as the rules were in place. First, shortly after the rules' adoption, independent scholars began to criticize aspects of the economic reasoning upon which the rules were based. Then, a special independent staff of the Commission questioned the rules' workability, as part of a comprehensive inquiry into commercial network practices.

This special staff of lawyers and economists was hired by the Commission in 1977 to review the Commission's network regulations, using approximately $2,000,000 specifically appropriated by the Congress for the purpose. More than 100 individuals from the industries involved were interviewed; extensive financial and other data concerning network programming development were obtained; cost and financial data from more than 50 program suppliers were reviewed; and the contract files for almost 50 network programs were examined. A final report was issued in 1980, after the public had been given the opportunity to comment on the staff's initial findings. This report disputed much of the economic reasoning on which the rules were based. The special staff, in fact, concluded that the rules were incapable of furthering the general Commission goals of diversity, localism or increased competition. The staff concluded that not only were the financial interest and syndication rules incapable of achieving their goal of lessening the networks' bargaining power in acquiring programming from producers and fostering the development of first-run syndicated programming, but the rules might in some instances worsen the situation by increasing rather than decreasing the concentration of program producers.

Based on the conclusions of the Network Inquiry Staff, the Commission decided to reevaluate these rules, and in 1982 issued a Notice of Proposed Rulemaking. An unusually long comment period was provided and more than 120 comments were re-

ceived, many of which included detailed economic studies. Reply comments were also filed. In addition, oral proceedings were held at which 40 parties presented their positions to the Commission. Among the formal participants were the Department of Justice, Department of Commerce and the Federal Trade Commission (through its Bureaus of Consumer Protection, Economics and Competition), each of which urged that the rules be deleted or modified substantially.

TENTATIVE DECISION

After carefully reviewing all of the evidence, the Commission announced its tentative decision in August of this year to eliminate the financial interest rule and to retain a modified syndication rule for a period of time. First, the Commission concluded that it is neither desirable nor necessary to control the ability of the networks to bargain for and acquire passive "financial interests" in programs purchased or produced for network exhibition. Second, the Commission found that the syndication rule was too broad in that it included all types of programming, and decided that its coverage should be limited to prime time entertainment series. Third, the Commission decided that networks must sell their synidcation rights in prime time entertainment series within six months after the network "run" or at the end of the fifth year of network exhibition, whichever comes first. Finally, the Commission decided that the remaining rules should sunset in 1990.

As noted previously, the Network Inquiry Special Staff had recommended elimination of the rules based on its conculsion that the economic markets involved and that the rules would be ineffective in accomplishing their stated goals of increasing competition and diversity in the program supply market. We found nothing in the comments submitted to the Commission in the current proceeding that rebuts those conclusions.

We found no credible evidence that the rules have fostered the development of first-run syndicated programming or increased diversity or competitiveness in the program supply market. On the contrary, the Commission concluded that because the rules do not change the number of networks (which is the source of any bargaining power they might putatively have) and because the rules only affect one of many terms in complicated contracts, the rules could neither reduce network creative control nor make first-run program production more profitable. Indeed, it appears that the rules, by excluding networks as sources of financing for program production, may result in barriers to entry for small program producers and create pressure on smaller producers to join with larger firms. The consequence of the rules may therefore be increased concentration in the program supply market. We also found no credible argument presented as to why network financial interests in programs would lead to an improper or inappropriate selection of programs for network broadcast. In short, the Commission concluded that the rules, as they affect relationships between the networks and program suppliers, fall as mechanisms to increase first-run syndication or foster competition in program supply.

Proponents of the rules, however, have focused on another rationale for the rules' retention that was barely touched on by the Commission when it adopted the rules: the relationship between the networks and independent television stations. Opponents of repeal have argued that through program syndication the networks could competitively damage independent stations in order to protect their own stations and affiliates. Specifically, they suggest that networks might collectively "warehouse" certain programs pursuant to an intricate scenario in a manner that could harm independents.

This scenario is, however, based upon a number of necessary assumptions. Our analysis has revealed that each necessary assumption is questionable at best. For example, networks would have to be able to control the prices of recent off-network series without fear that buyers would switch to alternative programming. In fact, however, surveys of broadcasters indicate that older series, sports, feature films, and locally produced programs can serve to some extent as alternatives, thereby exerting a constraining influence on the price of recent off-network series.

Another assumption is that television advertising rates remain unconstrained by other advertising media. That assumption is, at best, unproven and is becoming less viable with the increase in alternative video services. The other assumptions are equally suspect and when all the assumptions are taken together—as they must for the scenario to occur—the probability that warehousing would occur becomes very slight.

Remote as that possibility may be, the Commission's Tentative Decision nevertheless retains a narrowed syndication rule to reduce any possibility of warehousing. Because it is the potential harm to the independents that is the Commission's pri-

mary concern here, a number of modifications were made to the current rules, whose breadth is wider than is needed to protect the independents. First, because the warehousing scenario concerns syndication activities only, it was determined that the financial interest rule could be eliminated. However, in order that the networks would not indirectly control syndication, the Commission decided to limit networks to purely "passive" financial interests.

Second, the Commission determined that the syndication rule could be narrowed, so that only those syndication activities that were part of the warehousing scenario are proscribed. The warehousing scenario concerns the domestic syndication of off-network prime time entertainment series. Accordingly, the tentative modified syndication rule does not prohibit networks from bargaining for rights to foreign syndication or syndication of programs other than prime time entertainment series. In addition, the tentative rule permits networks to bargain for the syndication rights of prime time entertainment series, but—in order to preclude the possibility of warehousing—requires that networks sell the syndication rights within six months after the network "run" or at the end of the fifth year of network exhibition, whichever comes first. At that time, the networks are prohibited from retaining any active interest in the syndication of a program and from imposing any conditions, terms, or restrictions over the manner by which a program is syndicated. This proposed syndication rule is patterned in large part after the proposal made by the Department of Justice in its publicly filed comments.

Our tentative decision also provides that this modified syndication rule will "sunset" in 1990. Although we have tentatively decided that prudence currently warrants retention of a syndication rule to prevent warehousing, we also decided that we cannot justify keeping such a rule forever based on such a remote possibility. This is particularly so here, where the likelihood of each necessary assumption of the scenario occurring becomes less and less as the communications marketplace expands. With this expansion, the networks' share will decrease and anticompetitive activities of the type feared will become increasingly less likely.

In sum, because the Commission is particularly concerned that the growth of independent stations continues, we tentatively concluded that the public interest would be served by retaining a modified version of the syndication rule to protect independents from the unlikely possibility that their supply of programming would be restricted. However, because the networks' financial interest in programs has no direct relationship to the possible warehousing strategies, we found no justification for retaining even a modified version of the financial interest rule. The Commission stated that the financial interest rule has failed to increase the independent program supply, has had no effect on program diversity or quality, has not decreased network control over program content or creativity, and appears to create barriers to competition in program production.

Given the long history of our review of these rules, we are confident that our analysis of the effect of the rules in terms of the network-supplier relationship is correct. The Commission's decision was based upon a voluminous record which included many detailed economic studies. Interested parties have had ample opportunities to express their views and submit pertinent data and studies. We know of no individual or group which claims that any information or argument has not been given a fair hearing.

Throughout this proceeding the Commission has considered whether each rule serves the public interest. The rules have been evaluated against the criteria of fostering diversity and competition and with a view to how the service received by the public will be affected. We found no fault with the generalized objectives relied on by the Commission in adopting these rules. We did, however, find a failure to link the practical functioning of the particular rules adopted to these objectives. Moreover, the specific effort to alter the distribution of profits among private parties made neither good economic sense nor was it good public policy. This has never been a proper or desirable function of the Commission.

PENDING LEGISLATION

In view of the lengthy and detailed analysis we have undertaken, with the public interest as our standard of reference, it would be inappropriate for Congress to interpose a moratorium on further Commission consideration of these matters. A moratorium is certainly not needed for the Commission to compile additional information. The record in this matter is voluminous. It has been exhaustively reviewed. Extraordinary care has been taken to assure a full understanding of the economics involved and of the positions of all of the parties. This review has already taken over six years. Two Notices of Inquiry were issued to gather the views of all the

parties. A separate staff was hired pursuant to a specific appropriation from Congress for the purpose of reviewing the rules. In the current proceeding, the Commission provided an unusually long comment period, provided for oral presentations to the Commission, and then released its decision not as a final Report and Order but as a Tentative Decision so that additional comments could be received and any failings in the Commission's analysis highlighted. The parties have had an unusual opportunity to express their views, present evidence, and point out error in the Commission's analysis and conclusions.

The comments received in response to the Tentative Decision are now being reviewed. If the Commission, after review of the additional comments, adopts the Tentative Decision as final, there would still remain additional opportunities for reconsideration by the Commission and then for judicial review. I would note, moreover, that no changes in the Commission's rules will be of any practical operational consequence until parallel changes in existing antitrust consent decrees with the Justice Department are negotiated by the networks and receive court approval.

The Commission is now nearing the end of an exhaustive analytical process spanning many years. Congress established regulatory agencies to confront issues of just this type that benefit from such a comprehensive administrative review. It was pursuant to the Commission's rulemaking authority that we adopted the rules in question and pursuant to that same authority that we are currently reevaluating them. The Commission has proceeded in a manner to ensure complete fairness and is faithfully discharging the responsibility vested in it by Congress. Given this process, we believe that Congress should permit us to reach a final decision—under the public interest standard by which we are governed—and to conclude this proceeding without further delay.

Senator GOLDWATER. Thank you very much, Mr. Fowler.

Now, the subcommittee may ask questions of Senator Wilson and Mr. Fowler, and we will start with the chairman of the full committee.

The CHAIRMAN. Mr. Chairman, I appreciate that. We usually go on a first come, first serve rule, and you would be free to go first, since you were the first one here.

Senator GOLDWATER. I am making my rules.

The CHAIRMAN. I learned that long ago.

Senator Wilson, you quoted a letter from Ed Meese. What is the date of that letter?

Senator WILSON. The date is November 2, 1983.

The CHAIRMAN. Is that today? It already has been delivered today?

Senator WILSON. Yes. It is not far.

The CHAIRMAN. You cited a figure regarding the number of independent producers, post- and pre-rule. Could you give those figures again?

Senator WILSON. Yes. Just a second.

The figure as it related to the growth in the number of independent producers, was that your question, as opposed to the stations?

The CHAIRMAN. I think so. If you can give it to me again.

Senator WILSON. I will give you both. In the 1971-72 season there were 48 independent producers. By the 1981-82 season the number had grown to 81. In 1970 there were 65 independent television stations. By 1982 the number had grown to 179.

The CHAIRMAN. Give me the part about the producers again and the years, not the independent television stations.

Senator WILSON Just the producers, in 1971-72 there were 48; in 1981-82, 81.

The CHAIRMAN. What is the source of that statement?

Senator WILSON. The source is the—one source is the testimony before the Federal Communications Commission.

The CHAIRMAN. Do you know what the Committee for Prudent Deregulation is?

Senator WILSON. I understand that is also the submission of the producers themselves.

The CHAIRMAN. Do you know what the Committee for Prudent Deregulation is?

Senator WILSON. Yes. It is a coalition of independent producers and others, advertisers and others who are interested in retention of the rules.

The CHAIRMAN. Let me read you a statement. This is from the Tentative Decision and request for further comments of the FCC, released August 12. They make the following statement.

> There seems to be no disagreement that in the years immediately following the adoption of these rules, the numbers of producers supplying programs for prime time exhibition declined rather dramatically. Using the measurement statistics preferred by the Committee for Prudent Deregulation, the number of producers declined from 61 in the 1969–70 television season to as low as 30 in the 1974–75 season. Averaging the data supplied before and after the rules, again using the Committee for Prudent Deregulation preferred data, it shows an average of 66 producers per year in the pre-rule, 1964–71 period, and an average of 47 producers in the post-rule 1972–82 period—a decrease of 29 percent.

I wonder if you would comment on those figures.

Senator WILSON. The comment that I would make is that I think, as the chairman is seeking, if you want the actual number, I think that that is best achieved by opening the horse's mouth and counting, and I think that if you count you will find there are more independent producers and television stations in the numbers which I gave than there were at the time that the rules came into being.

The CHAIRMAN. But I am not talking about the independent television stations, just the producers.

Senator WILSON. I am talking about the producers as well.

The CHAIRMAN. So your position is that the statement of the Committee for Prudent Deregulation is wrong?

Senator WILSON. They will come in due time, Mr. Chairman. Ask them to explain that.

The CHAIRMAN. Well, then let me ask that of Chairman Fowler, if I might. That is a quote from your Tentative Decision.

Mr. FOWLER. We found that there had been a reduction, although slight, in the number of independent producers between promulgation of the rule and the present time. I think it went from 61, as I remember, down to 56.

The CHAIRMAN. Well, the figures that you are quoting from Committee for Public Deregulation, you cannot take it year by year. You must average it. But the average for the 1964–71 pre-rule period was 66 producers per year, from 1972–82, 47 producers per year. And, again, those are the Committee for Prudent Deregulation's figures which you have cited in your report.

Senator WILSON. Mr. Chairman, this may shed a little light on it. I do not know, frankly, but it occurs to me that perhaps the explanation is that the number may result from counting in a peculiar fashion, but if you count those who have become partners with the networks as one, then there is a significant reduction perhaps in the number of independent producers.

The CHAIRMAN. Let me ask you a further question. We have had both a network inquiry special study and the FCC hearings. Is

there any allegation that everyone who wanted to get heard did not get heard?

Senator WILSON. I am sorry. You are asking me?

The CHAIRMAN. Yes. I have not heard this allegation raised by anybody else, but as far as you know, did everyone who wanted to testify before the network inquiry special study and the FCC get a chance to testify or present views?

Senator WILSON. That would really be impossible to say. I am not aware of anyone who is complaining.

The CHAIRMAN. Nor, I think in fairness, would Mr. Valenti and others who come on. I do not think anyone would claim they have not had a hearing or have not had a chance to present their views. There is disagreement about the outcome, but not that they were shut out of the proceedings.

Now, you said that in looking at those proceedings we laid great emphasis on certain kinds of testimony, but we did not place great emphasis on the Department of Justice who brought the antitrust suits and finally entered into the consent decrees.

What was the Department of Justice's position when they filed and appeared before the FCC in this proceeding?

Senator WILSON. They supported the FCC.

The CHAIRMAN. So we are going to pay great heed to the Department of Justice, which you said we should, because it brought the suits and forced the consent decree. Their position at that time was what the FCC's tentative decision is, is that not right?

Senator WILSON. Well, I think my statement was quite clear, Mr. Chairman. I think that what we ought to pay heed to is the history of this rule and the long study made by the Department of Justice beginning in the 1950's, and the fact that even after the rules had been in effect for 10 years, the Department of Justice still found sufficient market concentration to warrant their having to enter into these consent decrees just 3 years ago.

The CHAIRMAN. Yes. But then with all of that history and 20 years of having brought the suits and the consent decrees, they appear before the FCC and support these rule changes.

Senator WILSON. That, Mr. Chairman, is frankly, I think we would both agree, not consistent with their having entered into a consent decree 3 years ago. And obviously, there has been criticism of the Justice Department, and specifically the Antitrust Division to which I alluded in my testimony.

I am sure the chairman recalls the vote on the floor the other day that I think made the point rather clearly that a number of us feel that way.

The CHAIRMAN. No further questions, Mr. Chairman.

Senator GOLDWATER. Thank you.

Senator Inouye.

Senator INOUYE. Senator Wilson, would you be willing to amend your measure to reduce the length of the moratorium from 5 to 2 years?

Senator WILSON. Senator, I would certainly consider doing that. As I may have indicated before your arrival, I personally think 5 years is the right amount of time. I think it will be at least 5 years before the committee will have a basis and experience sufficient to

allow the subcommittee to do what the chairman indicated you should do in his opening statement.

But 2 years certainly will provide experience that we do not have now. It is clear in my view that there is no reason to be optimistic that we would not revert to exactly the situation that occasioned these rules in the first place if they were repealed. But 2 years certainly would provide at least some experience. I suspect that at the end of the 2-year period we might very well have to find that we need more time, and therefore, might be once again required to extend the period of study.

Senator INOUYE. Supporters of your proposal have cited the danger of warehousing namely that the networks would withhold syndication of their programs. Is there any evidence that they have done this or would do this?

Senator WILSON. Yes. I think you will hear in greater detail from those who are representing the independent television stations that this is the case. And that is precisely the concern not only of the independents themselves but also of the people in the Association of National Advertisers.

The letter which I read into the record from the Mars Candy Co. indicates that they would have a concern of the same kind, and that their concern, to state it again, is that the reduction of the warehousing, as you have termed it, would result in a loss in audience because they simply would not be able to attract people, they would not get the kind of shows that people will watch; therefore, they would not get the advertisers.

Senator INOUYE. What do you say to the argument by opponents of your proposal that it would only add to the cost of production and, therefore, to the cost to consumers?

Senator WILSON. Why would it add to the cost?

Senator INOUYE. I have no idea. I am asking about the networks' argument.

Senator WILSON. Neither do I. I think that is a specious argument. I think that the only way it could add to the cost is if you take a rather unattractive point of view that somehow before these rules existed the market concentration permitted the networks to extract the independently produced programing at a rate that was not adequate compensation to the producers. But frankly, I cannot make much sense of that question.

Senator INOUYE. Thank you very much.

Senator WILSON. Thank you, sir.

Senator GOLDWATER. Senator Wilson, because of the question asked by the Senator from Hawaii, I think that it would be proper at this time to ask you to read into the record the letter received from Edwin Meese. I think you have a copy.

Senator WILSON. Yes, I have, and I would be happy to read it, Mr. Chairman.

The letter is dated November 2, 1983.

The President has asked me to respond to your letter of July 20, 1983, expressing your concern regarding the syndication and financial interest rule in the television industry. We appreciate your views and have since been in the process of examining all sides of the issue.

As you know, the President has consistently favored Government efforts to promote vigorous competition. However, he has determined in this instance, in light of changing market conditions in the television and program production industries, ad-

ditional review of the consequences of repeal of the rule is necessary. Accordingly, after careful consideration of this matter, the President has decided to support a 2-year legislatively mandated moratorium on any change in the syndication and financial interest rule. A 2-year moratorium would allow us to give the issue further study and monitor future changes in the marketplace, while at the same time insuring continuing healthy competition within the industry.

Senator GOLDWATER. And that is signed Edwin Meese?

Senator WILSON. That is signed Edwin Meese III, Counsellor to the President.

Senator GOLDWATER. Thank you very much.

Do you have any questions of the chairman, Senator Inouye?

Senator INOUYE. No thank you.

Senator GOLDWATER. Senator Pressler, I think you are next.

Senator PRESSLER. Yes. I will be fairly brief. I would like to address a question to each of you.

What effect would this action have, one way or another, on a typical television viewer in my State in the next 2 or 3 years?

Senator WILSON. Senator, I think that is a very good question, and that is really the basic question. It would affect that viewer in your State in two ways. It would affect Mrs. Murphy in, where was it, Humboldt. It would affect her first as a consumer of television programing. She would enjoy much less diversity, much less range of choice, and, frankly, I think much less creativity. And I would ask that you retain that question for the panel that includes those who are producers. Mary Tyler Moore, Norman Lear, and others will be before you, and I think they can tell you what they feel as a result of their experience.

Senator PRESSLER. You said there would be less diversity?

Senator WILSON. There would be less diversity, less creativity, less choice. I think they will tell you about some of the things which the independents have done, some of the things they have tried to do before the rule existed, and constraints upon creativity that were imposed upon them by the networks.

The other way in which Mrs. Murphy would be affected is as a consumer of the products that are advertised on free television, and what would happen is quite clear from the testimony of the Association of National Advertisers before the FCC in opposing a change in the rules.

What they said—in fact, if I may, Mr. Chairman, I will take a moment and excerpt from their testimony, because I think it is particularly pertinent.

Thus, for many advertisers, the number, which is growing as new products and services, television can provide the greatest opportunity for advertising effectiveness and efficiency. Television for these companies is their prime advertising medium and a critical element of advertising efficiency.

ANA opposes the FCC staff proposal to rescind the financial interest and syndication rule because such action is clearly premature and would create a significant risk of further concentrating the television advertising market at a time when more competition is just beginning to emerge.

Rescinding the rule now we believe will, one, harm the independent television stations and the newer media such as cable and the superstations; two, reduce the public's viewing option; and, three, make television advertising less effective, less efficient, and more costly.

And they cited that in those markets where they enjoy competition between the independent television station and the network affiliate, the rate card for them as advertisers is 20 to 60 percent

less now. National advertising has come to be an enormous amount of our gross national product, I think something like 2 percent. I was astounded.

If you think of what 20 to 60 percent means in terms of numbers, it means that a considerable part of what they must charge the consumer of goods and services that are produced by the advertiser, who is the sponsor of the television show, I think the implication is very clear that what they charge is a good deal more for the product than they otherwise might have to. And that is the concern of the national advertisers.

Mr. FOWLER. Senator, I think I would answer that with two points. One, our tentative decision found that if you permitted the networks to own or bargain for an ownership interest in program productions, this would make it possible because of the revenues that would accrue to the networks if the show was successful and was put into syndication after it goes off the network—it would make it possible for the networks to be able to engage in discussions and agreements with small independent producers.

Now, the small independent producers typically have two things in common. One, they do not have any facilities for production themselves. They have to rent facilities or get someone to back them and use somebody else's facilities. And, two, typically they do not have financing, and they need financing.

We found that if the networks could have a financial interest, they would be able to provide three other sources of financing for these independent producers, small independent producers who typically have innovative ideas and program themes. And so it is logical to believe that that would allow for Mrs. Murphy to see some programs that might not otherwise be shown on the networks.

As it is now, those independent producers basically must go to the big eight Hollywood producers for financing in order to get a production done.

Second, there are some who argue—and we also noted this in our tentative decision—that if the networks can have a financial interest in a program that is being produced, they will have an incentive to put more money into the production, into the quality of the scripts, the kinds of actors and actresses that are retained, the general quality of that production on air, because it will permit them to receive revenues from the syndication of that program after it comes off the net. And, therefore, having a stake in the program up front, they will have an incentive to make it a better program when it is on the air.

Those are two points I would make. I would note that HBO does this right now; that is, they do engage actively in working deals and financing independent producers who have different, diverse ideas they would like to bring to market but are financially unable to do so.

I would note that the Hollywood producers do not like the idea that HBO is doing deals with the independent producers, and I understand that. But the public interest, it seems to me, is served by that kind of a process.

Senator PRESSLER. So, in other words, you also argue that there would be more creativity and diversity if your position prevails?

Mr. FOWLER. We cannot say that there necessarily will be more, Senator, but it is logical to assume that there would be.

Senator PRESSLER. And your feeling is that the networks would help the small independent producers more?

Mr. FOWLER. They would, because they would have a financial interest in joint venturing with the independent producer. They would be willing, one, to finance the deal, and, two, they would have an incentive, more of an incentive to reach an agreement because of the added revenues that they would gain on the back end when it went into syndication by virtue of their ownership interest with the independent producer in that particular production.

Senator PRESSLER. How do you respond to that, Senator Wilson?

Senator WILSON. I would be pleased to. I think that it is quite significant that of all those who have testified before the FCC, but one small independent lined up on the side of the networks, and the others all are on the side of those who are opposing change in the rule.

Senator PRESSLER. Are these existing? Is there a definitional issue here? Are there some independents who would be formed by the networks and so forth?

Senator WILSON. Well, I think, by definition, if they were formed by the networks they would not be independent.

Mr. FOWLER. Senator, there were some independent producers who testified in the oral arguments we had that it would help them to be able to have three additional sources that they could go to for financing for joint venture projects on programs that they would like to bring to market.

It also may be that there are a lot of folks out there who would like to be independent producers but are not even in the game now who would feel that it would be an advantage to have three more sources of financing.

Senator PRESSLER. So, in other words, both of you would agree that if there were more independent producers, there would be more diversity on TV?

Senator WILSON. Precisely, Senator, and that is why we have made such a point of the fact that during the pendancy of the rules there has been a considerable and a very significant growth in the number of both independent television stations and independent producers.

Mr. FOWLER. I take exception to the last statement of the Senator, respectfully. We found that there was a decrease in the number of independent producers, and we were looking here at a summary, looking at the number of hours in prime time in 1969 and 1970 which was immediately prior to the promulgation of the rule, and in 1981 and 1982.

And according to the Committee for Prudent Deregulation, which is the coalition of Hollywood producers and others, the top 20 producers provided 62.8 percent of the hours of prime time in 1969 and 1970. Those same top 20 producers provided, according to CPD, 63.5 percent in 1981–82. So, if anything, the concentration is the same or slightly greater than it was before.

Under CBS 'method of calculation, the top 20 producers provided 70 percent of the prime time programing in 1969–70, and in 1981–82, 87.7 percent.

Senator WILSON. Senator Pressler, I would only say that if the chairman is going to cite some CBS statistics, let me suggest that you direct the same questions that you have asked him and me to both the networks and also to the independent producers when they come before you. I think you will find that the independent producers have found that there has been a great growth in their ranks and that small companies that wanted to get into the business have been able to do so in a way that they really were not able to do prior to this.

Frankly, I think it is an unhealthy thing for the small producers to have to look to the networks. I mean if the argument for allowing financial interest on the part of the networks is that they are going to assist small producers, there certainly are other sources of financial commitment for them. And I do not think that we should allow this kind of market concentration to occur with all of the abuses that prompted the creation of the rules in the first place simply on the argument that the networks may, if they have a financial interest, be inclined to assist small producers through financing.

Mr. FOWLER. Senator, I think, just in closing on that point, I think it may be preferable to have a situation where the independent producers can look to the networks as three additional sources of financing rather than solely looking, essentially, to the big eight Hollywood producers who are their competitors.

Senator PRESSLER. Do we have any small producers coming? Are these the small producers, in your view?

Senator WILSON. I cannot answer because I do not have a witness list.

Senator PRESSLER. These would be considered the big producers, would they not? I guess it is a matter of definition.

Thank you, Mr. Chairman.

Senator GOLDWATER. Senator Ford, do you have any questions?

Senator FORD. I have one or two, Mr. Chairman.

I ask this same question of Senator Wilson and Chairman Fowler. What good will a moratorium do?

Senator WILSON. Well, Senator, it will do a great deal of good, as am I and a number of people who are opposing change in the rule because a change would be harmful. And even if you are uncertain that the change will be harmful, that it will produce the kind of abuses which prompted the creation of the rules in the first place, then the delay, whether it be for 2 years or for 5 years, will allow a testing of the networks 'argument that there is sufficient competition to justify a change in the rule.

Clearly, there is not sufficient competition now, I mean by any kind of definition or any measurement of market share. The lion's share is, and by their own projections, will remain with the networks.

The underlying premise that justifies a change in the rule as advanced by the networks is that there is not the same situation as in 1970, that there is now a competition that did not then exist. Frankly, that premise is almost faulty on its face, but what I am saying is that I think we do share one point of view, and that is a hope that there will be competition of a kind that will benefit the consumer. And I am delighted to see the opportunity for it to

occur. If there is a delay, we will find out whether or not this change in market share, whether or not this competition is developing. And if in fact it is, if there comes a time when the situation is vastly different than it is today, then these rules can at that point appropriately be repealed.

But the point really is that until we get there, we will never have the opportunity to get there if the rules are repealed today, because the result will be that independent television stations cannot receive the kind of shows that will allow them to attract advertisers because they will not attract audiences.

Senator FORD. Well, if we listen to your theory, we will never do anything because there are always changes, and you want to wait and see, and defend the side that you are supporting.

Chairman Fowler.

Mr. FOWLER. Senator, I think it is important to note that we started under a Democratic chairman with a Democratic Congress that appropriated $2 million in 1977 and said we want you to look at these rules. And in 1980 that network inquiry study came out with a report after having extensive comments filed and reviewing a very exhaustive and voluminous record.

In 1982 when we went forward with this we asked the question "Do these rules make any sense?" and I would like to note that all of the parties that had no financial interest in this proceeding and were experts—that is, the network inquiry staff, the Department of Justice, the Federal Trade Commission staff, and the Department of Commerce—concluded that the financial interest rule did not further any public interest.

Now, after we went forward with the rulemaking we received comments. We then received reply comments. But prior to receiving the reply comments we had a whole day of oral arguments and had 42 different parties testifying, representing producers, networks, public interest groups, concerned citizens, labor, and so forth.

And after we digested this very large record, we came out not with a final order but with yet another decision which was tentative, a tentative decision which we then put out for comments.

Now, I think that from the Congress standpoint there are two points. One is, I believe you all would be better served if you had before you before you act a final decision of the agency. You have set the law up so the process works a certain way, and we are very close to the end of that process.

And I would submit to you that you would be in a better position to evaluate our decision if you had a final decision, not a tentative decision, before you for your consideration.

The second point is that you have the power at any time to modify, change, countermand totally any decision that this agency makes under the system as we have it today. So you will have that power at any time, and I think that if the agency is now ready to move forward and wind this up, you will be in a better position if you allow it to go ahead.

Senator FORD. Well, let me ask you, Chairman Fowler, you have explained the rulemaking proceeding process. It has been roughly 5 years in the making.

Mr. FOWLER. Actually 6 years altogether—not the rulemaking process but the entire process.

Senator FORD. What has that cost the taxpayers to go through all of that?

Mr. FOWLER. I could not give you an exact number. I know we expended at least $2 million on the first phase of that, and I imagine we have probably spent another $2 million since that. We have certainly invested enormous energy on this particular proceeding, and being, as we are right now, down to the final moments in the game, so to speak, it might be preferable for you to permit us to complete the process, and then you could look at it.

Senator FORD. Do you think there would be any new forces in the marketplace in the next 6 months or the next 2 years that would change your decision?

Mr. FOWLER. Well, it is an ongoing and dynamic process. I am sure there would be. I do not know what the significance would be over that short a time period.

Senator FORD. Well, let me ask you another question. What are the dates of expiration of the members of the FCC?

Mr. FOWLER. Well, I plan to serve a life term. As for the others—Commissioner Quello's term expires on June 30, 1984. Commissioner Dawson's, I believe, expires in 1988, June 1988. Mine expires June 30, 1986. And Commissioner Rivera expires, I believe, in 1987, June 1987.

Senator FORD. Then you have one vacancy to fill next year and another one in 1986.

Mr. FOWLER. And there is one seat open now, and that expires in June 1985.

Senator FORD. So we have a seat open, one expires in 1984, and we have a letter from Ed Meese that was read into the record which indicated that the President supports a legislatively mandated moratorium on any change.

Well, if you could hold out until June 30, 1984, it would be interesting to see what happens on the board.

Senator Wilson, are you familiar with Congressman Waxman's bill that is now in the House?

Senator WILSON. Yes, I am.

Senator FORD. That was reported out yesterday, was it not?

Senator WILSON. It was.

Senator FORD. What was Congressman Waxman's original time for a moratorium?

Senator WILSON. It was the same as mine.

Senator FORD. Five years?

Senator WILSON. That's right.

Senator FORD. What was reported out of the committee?

Senator WILSON. Six months.

Senator FORD. Thank you, sir.

Senator GOLDWATER. Senator Hollings.

Senator HOLLINGS. Thank you, Mr. Chairman.

Senator WILSON. Before I leave that subject, though, Senator, I think you should understand the context.

I understand that next week Congressman Waxman is going to introduce a 5-year bill.

Senator FORD. I just merely asked you a question. You have got a 5-year bill in here, and you will take 2 years today, so I wonder where you all are. You are all over left and right field.

Senator WILSON. No. We would prefer 5 years.

Senator FORD. I know. But you got 6 months in the House yesterday.

Senator WILSON. We would be happy, Senator, if you wanted to go for 5 years right now.

Senator FORD. I think you ought to let the process work and let us change it. That is what Congress is all about.

Senator GOLDWATER. Senator Hollings.

Senator HOLLINGS. Mr. Chairman, I congratulate you on presiding here on our subcommittee. It has been quite a while since we have had a subcommittee meeting.

Senator GOLDWATER. Yes, it has been.

Senator HOLLINGS. I am glad to be at one, glad to get back and see that you are presiding now.

Senator FORD. Could I intervene in this colloquy?

When he has one, he has one, though, does he not?

Senator HOLLINGS. As a former chairman of the subcommittee and now the ranking member, Senator Goldwater, our present chairman, and I met going over the items to be considered by the subcommittee. We determined the early part of the year that we would allow the Federal Communications Commission to come down with their finding, just exactly, Mr. Chairman Fowler, exactly what you asked just a minute ago in your testimony that you be allowed to do. As you have explained so clearly to the committee itself this morning, you have been through two administrations and a 5-year hearing record in order to come to even a tentative decision, and this has been run through the Appropriations Committee, which I also serve on, is bad procedure.

We cannot as a committee here make a determination, as I see it, or should not just off the cuff without your final decision and the full record to be reviewed, unless there is some extreme thing.

Now, No. 1, when would you have that final decision? What is your estimate now about that?

Mr. FOWLER. I would hope we could do it by the end of this year, sir.

Senator HOLLINGS. You would have that by the end of the year. What is the extreme thing that gets the White House—they have got Grenada and Lebanon and everything, and all of a sudden they find now that the President has studied this. I hope he is not studying it. It says he is.

He has got too many more important things to find out about than movie producers and network producers. The networks are producing now, are they not?

Mr. FOWLER. Yes, sir, they do produce some.

Senator HOLLINGS. There is nothing to prohibit that?

Mr. FOWLER. No, sir.

Senator HOLLINGS. And you say that the other competitors, namely HBO, is able to controvert the particular rule and they can go ahead and buy and have full ownership.

Mr. FOWLER. Yes, sir.

Senator HOLLINGS. It is sort of similar to the situation that we had with the AT&T. We had these independent producers, MCI and all the others, come around, but the rule, the 1956 consent decree, forbade AT&T to do anything or participate or compete. We just found, this committee, after many years of hearings around here, that that could not persist any longer, and we should deregulate, and we did.

It strikes me that that is the course that we are on now with respect to being fair. What is the big public interest? I do not see—and I am not trying to be facetious—the reason in the original instance in 1970, Chairman Fowler, can you tell the committee what was the reason for the rule?

Mr. FOWLER. Well, one of the thoughts was that the networks had so great an amount of bargaining power, in terms of negotiations on who owned what piece of a particular production, that a rule would be required which would shift the bargaining power to the producers and away from the networks who controlled a bottleneck in distributing programs.

The problem with that, we thought, was that financial interest was simply one term in the contract. In other words, there are other terms in the contract that could be changed to compensate for the networks' inability to have a financial interest. Another reason for the rule was to promote diversity, and part of the theory of the rulemaking was that if you shifted the bargaining power to the producers, by virtue of that shift they would enjoy greater revenues and they would then be able to go out and do good things by producing new, what we call first-run programing; that is, programing that did not go on the network first but went directly to the stations and therefore would compete with the networks in the local video markets.

And another one was it would help to wrest creative control from the networks and put it more with the producers.

Senator HOLLINGS. And as far as you can tell right now tentatively, the Federal Communications Commission has determined that that has not worked?

Mr. FOWLER. No, sir. None of those purposes really. We believe that the 1970 proceeding was, as we said in the tentative decision, somewhat misguided.

Senator HOLLINGS. What was the vote on the tentative decision? Was it just a split vote?

Mr. FOWLER. It was a complicated vote, but essentially it was three to one for the tentative decision.

Senator HOLLINGS. And right now with respect to pressures being brought, what contact, directly or indirectly, has President Reagan had with you on this score?

Mr. FOWLER. I briefed him several weeks back, sir, at the White House. I had offered some time ago to provide him with a briefing on the various communications issues before the agency, and he took me up on the offer.

Senator HOLLINGS. Finally, on this score——

Mr. FOWLER. Well, I talked to him not only about financial interest and syndication but about direct broadcast satellites, what cable is doing.

Senator HOLLINGS. Oh, I see. When did this occur, this briefing, approximately?

Mr. FOWLER. September 28.

Senator HOLLINGS. About 5 or 6 weeks ago, I see. And so now he is interested in communications, and you briefed him on that.

What other contact other than that briefing?

Mr. FOWLER. Well, I think he has always been interested in communications, Senator, since his background is one of, like me, having been an announcer and disk jockey at one time. But this is the first time I have had a chance to brief him personally on the issues. It seemed to be a propitious time because there are many issues, including what is going on in the common carrier area, that it seemed that now was as good a time as any.

Senator HOLLINGS. And my question was what other contact, directly or indirectly, has the President had with you on this score other than September 28?

Mr. FOWLER. None.

Senator HOLLINGS. Just that one briefing?

Mr. FOWLER. That is correct.

Senator HOLLINGS. Thank you very much, Mr. Chairman.

Senator GOLDWATER. I have only had one discussion with the President, and that was at 11 last night, and I told him I thought he was doing something he shouldn't.

Senator HOLLINGS. Do you mean on this score?

Senator GOLDWATER. On this score. Otherwise, I think he is doing a good job.

Thank you, gentlemen.

Senator WILSON. Thank you, Mr. Chairman.

I would just point out in conclusion that I think that Senator Hollings was seeking to make an analogy to the AT&T situation. I had not heard a suggestion that the committee is supporting the breakup of the networks.

Senator GOLDWATER. Thank you very much.

Now, our first panel will be the following, and they can come up and take their places at the table.

The Honorable William Baxter, Assistant Attorney General, Antitrust Division in the Department of Justice; Andrew Strenio, Assistant Director of Regulatory Evaluation, the Federal Trade Commission; and the Honorable David Markey, Assistant Secretary of Commerce for Communications and Information.

You gentlemen may sit down, and if you have prepared statements, we will print them in the record. And we would ask you, if you would, to summarize your statements. Finally, keep within the bounds of the lights.

The CHAIRMAN. Mr. Chairman, could I ask just one question first so I am sure who is speaking for whom?

Attorney General Baxter will recall when we had the testimony on further trucking deregulation from the Department of Justice that the Department of Transporation favored it and the Interstate Commerce Commission favored it. When I said what is the administration's position, they had no view. So I just want to make sure who is speaking for whom today.

Mr. Baxter, in your statement you say you are speaking for the Department of Justice.

Mr. BAXTER. I was very careful in my statement to try to distinguish the positions the Department of Justice has taken before the FCC and other portions of my statement where I purport to be speaking on behalf of the administration. And I would say that in general I am speaking on behalf of the administration today.

The CHAIRMAN. I asked because Department of Commerce also says they are speaking on behalf of the administration, and I just want to make sure. And the FTC is speaking on behalf of itself?

Mr. STRENIO. The FTC staff, sir.

The CHAIRMAN You mean you are not speaking for the FTC?

Mr. STRENIO. The testimony has been authorized by the full Commission as a staff statement rather than as a Commission statement.

The CHAIRMAN. As a staff statement. And it has been authorized by the full Commission, but it is not a Commission statement.

Mr. STRENIO. That is correct.

Senator FORD. Mr. Chairman, I think something is going on here.

The CHAIRMAN. Well, does the full Commission stand behind the staff statement?

Mr. STRENIO. The full Commission voted to authorize it. This is not a change from the prior filings because they have been staff comments all along on this subject. Having staff testimony now is consistent with having the staff comment on the first round and then the reply round at the FCC.

The CHAIRMAN. When I talk about this in debate, I just want to make sure if I can refer to this as the FTC's position or only the staff position as authorized by the FTC.

Mr. STRENIO. The latter, Senator.

The CHAIRMAN. OK. I will try to figure out the difference.

Senator GOLDWATER. Mr. Markey, if you prefer, or if you have another order you would like to go in, do it, but try and keep your comments short.

STATEMENTS OF DAVID MARKEY, ASSISTANT SECRETARY OF COMMERCE FOR COMMUNICATIONS AND INFORMATION, DEPARTMENT OF COMMERCE; WILLIAM F. BAXTER, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, DEPARTMENT OF JUSTICE; AND ANDREW STRENIO, ASSISTANT DIRECTOR OF REGULATORY EVALUATION, FEDERAL TRADE COMMISSION

Mr. MARKEY. I will be happy to start, Mr. Chairman. I can assure you these will be short comments.

Mr. Chairman, we appreciate this opportunity to very briefly express the views of the administration on S. 1707 which would continue the financial interest and syndication rules in their present form until July of 1988.

While the Department has indicated in its filings—that is, the Department of Commerce at the FCC—that Commerce supports abolition of the rule, the administration had taken no position, nor was there any compelling reason to do so.

Now that the Congress has asked for the administration position on the subject of the legislative moratorium on the FCC rulemaking, the administration has determined that some legislation might be advisable.

It is our position that a 2-year moratorium on any consideration of this issue at the FCC would provide an opportunity for a more comprehensive assessment in the marketplace and give the FCC and the interested parties additional needed information.

The question of video competition to the networks is one over which reasonable men may differ. It is the belief of the administration that a 2-year hiatus will give us a chance to see if trends develop or continue that will make this difficult decision easier. We think that the 2-year period is enough time to make these judgments, and that the 5-year period in the bill would not be advisable. If the marketplace is developing as rapidly as some claim, then we would have the evidence by 1986.

Let me further point out that the tentative Commission decision does not abolish both rules until 1990. If after a 2-year delay the Commission still wished to end the rule on the same date—that is, both rules—it could still do so.

Mr. Chairman, I should point out again that this position is taken only on the legislation before the committee. There has been no position taken by the administration on the merits of the proceeding at the FCC. This is a position that deals with the timing of the consideration of the issue and not with the eventual merits of the proposal.

We recognize that this is a very controversial issue for the parties involved, and in order to come to the best possible judgment, it makes some sense not to make a decision until we have the benefit of as much information as possible.

The administration believes that a 2-year moratorium would provide us with that information.

Thank you, Mr. Chairman.

Senator GOLDWATER. Mr. Baxter.

Mr. BAXTER. Thank you, Mr. Chairman.

I have submitted a written statement. I will try to be very brief in my summary in the interest of time.

As Mr. Markey has indicated, the administration has reached the conclusion that it would not support S. 1707, as written, but would support a shorter 2-year moratorium. The Department of Justice, the Antitrust Division in particular, has been an active participant in the proceedings before the FCC.

We have done our own study of these problems. The industry is a complex one. It is rapidly changing. It is not easy to be absolutely confident what effect the FCC's rules are now having or what effect their removal would have. And accordingly, we, of course, support the decision for a delay during which it will be possible to observe whether patterns that we now think are discernible will become clearly established.

The change in the industry is very rapid, being driven by a rapidly changing underlying technical base as well as by consumer taste. Thus, a period that would make further observation possible, on the order of 2 years, seems well advised.

[The statement follows:]

STATEMENT OF WILLIAM F. BAXTER, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, DEPARTMENT OF JUSTICE

Mr. Chairman and Members of the Subcommittee:

I am pleased to have this opportunity to provide you with the views of the Department of Justice on S. 1707, a bill entitled the "Competition in Television Production Act." The bill would provide a moratorium until June 30, 1988, on changes to the existing Federal Communication Commission rules regarding network television syndication, network television financial interests, and prime time access. For the reasons I will discuss, the Administration opposes enactment of this bill as written but would support a shorter, two year moratorium.

The syndication rule prohibits television networks from program syndication—the sale, licensing or distribution of programming to television stations for non-network broadcast—or from sharing in any revenues from syndication of any television program not produced by the networks.[1] The financial interest rule prohibits all television networks from acquiring any financial or proprietary right or interest in syndication of any program not produced by the networks.[2] The prime time access rule provides that network-owned or network-affiliated stations in the top 50 television markets may carry only three hours of network programming during the four "prime time" hours.[3] S. 1707 would prohibit the FCC from changing these rules before June 1988.

The Administration opposes a moratorium on changes in the FCC's financial interest, syndication or prime time access rules for a period as long as 5 years but would support a 2 year moratorium.[4] The FCC is in the final stages of an exhaustive reevaluation of the financial interest and syndication rules. In this proceeding the Commission has reconsidered the theoretical basis of the rules and the rules' practical effects since their adoption in 1970. The Commission has developed an extensive record that includes comprehensive economic and legal analyses, as well as a voluminous data. Representatives of virtually every segment of the television program production and distribution industry have submitted comments to the FCC. In August 1983, the Commission finally adopted a Tentative Decision that proposes a modification of its rules.[5]

The Department agrees in large measure with the findings and analysis of the Tentative Decision. We think it likely that the rule proposed by the FCC will eliminate any serious risk of anticompetitive network conduct and reduce the modest costs imposed by the present rules. We have suggested some minor modifications to the proposed rule in comments filed with the FCC on September 20, 1983, a copy of which we have submitted to the Subcommittee, and we believe that the direction taken by the FCC is probably sound.

The FCC's review of the rules date back to 1977 when it initiated a broad inquiry into network practices.[6] After several years of study, the Network Inquiry Special Staff concluded that the rules did not promote competition in the program production market and might cause inefficiency and increase concentration in that industry.[7] In July 1982, the FCC initiated a rulemaking to reexamine the financial interest and syndication rules.[8]

Proponents of the rules and supporters of S. 1707 argue that repeal of the financial interests and syndication rules would, to the detriment of the public, increase the network's power over both the producers who sell programming to networks and the independent stations who compete with network-owned and network-affiliated stations. It is predicted that repeal could have such effects as forcing out of business small, independent producers and independent television stations; reducing produc-

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[1] 47 C.F.R. § 73.658(j)(i).

[2] 47 C.F.R. § 73.658(j)(ii).

[3] 47 C.F.R. § 73.658(k). Prime time is 7–11 p.m. Eastern and Pacific time and 6–10 p.m. Central and Mountain time. The rule excepts certain types of programming, including regular network news broadcasts when adjacent to an hour of continuous locally produced news programming.

[4] The FCC's Mass Media Bureau recently issued a ruling which makes clear that the financial interest and syndication rules proceeding will not affect the prime time access rule. Order Sept. 14, 1983. Hence, there is to be no cause for limiting the FCC's authority with respect to the prime time access rule. However, the Department has not analyzed or taken a position on the merits of the prime time access rule and my testimony does not discuss the rule.

[5] Amendment of C.F.R. §§ 73.658(j)(1)(i) and (ii). The syndication and Financial Interest Rules, 48 Fed. Reg. 38020 (1983).

[6] Commercial Television Network Practices, 62 F.C.C.2d 548 (1977), Further Notice of Inquiry, 69 F.C.C.2d 1524 (1978).

[7] Network Inquiry Special Staff, An Analysis of Television Program Production, Acquisition and Distribution (June 1980).

[8] 47 Fed. Reg. 32959 (1982).

ers' willingness to take risks on "quality" programming; and reducing diversity of television programming. Based on our independent analysis of the rules, we have concluded that concerns about effects on program producers and "quality" and diversity of programming are probably overstated. On the other hand, we have concluded that there is some basis, at least in theory, for concern about effects of repeal on independent television stations.

The Department has been an active participant in the FCC proceeding. The Department's earlier comments to the FCC argued [9] that the rules do not promote competition in the program production market or increase diversity of programming. Rather, the rules appear to create inefficiencies in program production. We acknowledged, however, that under limited circumstances the networks may have the incentive and ability collusively and unlawfully to withhold some programs from syndication, thereby harming independent television stations (the so-called "warehousing" problem). Given this possibility, we concluded that complete elimination of the rules might increase the risk of anticompetitive network practices. Thus, while we have previously urged the FCC to eliminate the financial interest rule entirely, we recommended adoption of a narrow syndication rule. The rule that we proposed would have required the networks to sell all syndication rights to prime time entertainment series at the end of their runs on the networks.

The FCC's Tentative Decision conformed in its major respects with the Department's analysis. The Decision concluded that the rules "were either initially misguided or are no longer necessary in light of evolving market conditions." [10] The FCC based this conclusion on several key findings. First, since the rules do nothing to change the market structure of the television industry, they are not likely to reduce any market power the networks may have.[11] Second, the rules cause some inefficiency in program production by preventing the networks from sharing risk through acquisition of financial insterests in program syndication. Further, to the extent the rules favor producers able to bear the risk of program production, they may have tended to promote increased concentration in the program production market as their preclusion of risk-sharing arrangements by the networks may hamper the entry of new program producers. In this regard, the Commission noted that there has been virtually no increase in the number of producers providing programs to the networks since adoption of the rules.[12] Third, there is some small risk that repeal of the rules might allow the networks to "warehouse", that is, reduce availability of off-network programming sold in local television markets, thereby driving up the price of programming to non-network television stations. While there is little likelihood that it would be practicable of the networks to "warehouse" program material and still less likelihood that they could do so profitably, the possibility cannot be disregarded entirely.[13]

Nevertheless the various issues are admittedly of great complexity and involve an industry that is undergoing very rapid change, change that is driven both by a rapidly changing underlying technology and by changing patterns of consumer demand. Given those circumstances, reasonable people may and do differ about the precise effect of the existing rules and about the effects that would be caused by this alteration. In the face of those uncertainties and the sharply differing views within the affected industries, the Administration has concluded that the reasonable course is to wait and watch for a short period during which it should become clearer whether patterns that appear to be developing become firmly established. Accordingly, the Administration would support legislation imposing a moratorium for two years.

Senator GOLDWATER. Mr. Strenio.

Mr. STRENIO. Mr. Chairman, members of the committee, thank you for the opportunity to present these views of the staff of the Federal Trade Commission. These views have already been presented to the FCC in the form of written comments and reply comments,* and I would like to submit copies of those comments for the record. I would also like to note in doing so that the dissenting

[9] In addition to the filing referred to above, the Department also filed comments on Jan. 20, 1983, and reply comments on Apr. 20, 1983, in the proceeding.

[10] Tentative Decision at ¶ 14.

[11] *Id.* at ¶¶ 131–32.

[12] *Id.* at ¶¶ 136–44.

[13] *Id.* at ¶¶ 145–76.

* Copies of FTC filings are available in committee records.

statements to those comments by Commissioners Michael Pertschuk and Patricia Bailey are attached.

My purpose today is to summarize very briefly for you the conclusions contained in those filings—conclusions that were reached as a result of detailed analysis and empirical research.

As noted previously, the testimony I am about to give represents staff views and not necessarily the views of the Federal Trade Commission or any individual Commissioner. The Commissioners have, however, unanimously voted to authorize me to deliver this testimony. I will take up the chairman's invitation to just summarize the written testimony, which I would also like to submit for the record.

As you know, the Federal Trade Commission has considerable experience and expertise in performing the kinds of competitive and economic analyses relevant to some of the fundamental issues in the debate over the rules.

The Commission's involvement in communications issues derives from its twin missions of fostering competition and promoting consumer interests. I would like to emphasize that the staff's comments and review of the rules were explicitly limited to the economic and competitive areas. The staff clearly recognizes that the FCC statutory responsibility may appropriately encompass other goals. Any action to implement such goals can be aided, however, by a sound understanding of relevant economic considerations.

The staff's conclusions can be stated simply. In the opinion of the three bureaus, the rules have not resulted in significant economic benefits such as enhancing efficiency, promoting competition or increasing consumer welfare. Regarding the hypothetical threat of network collusion, the staff concluded that network collusion would be extremely difficult to coordinate and maintain. In addition to the great difficulty networks would have in colluding successfully, the injection of progressively greater amounts of competition into the industry as a result of the new video delivery systems and the continued presence of the antitrust laws and agencies to challenge any anticompetitive behavior would seem to make a prophylactic rule unnecessary.

Moreover, economic analysis indicates that the rules could impose costs by disrupting efficient risk-sharing arrangements between networks and small independent program suppliers.

The Commission staff thus concluded that a strong case for continuing the present rules has not been made and recommended that the rules be repealed. The staff also noted that if modification rather than repeal is favored by the FCC, a broad range of reasonable options could still be improvements on the existing syndication rule. One of those options, which the Commission staff stated would be an improvement on the status quo, has been essentially incorporated in the FCC's tentative decision.

I would like now to expand briefly upon three points. First, in examining the rule's asserted benefits, the staff's analysis focused primarily on the warehousing argument; that is, that the networks would choose to withhold their programs from syndication. This would succeed only if the networks were able to monopolize recent prime time series and withhold programs from the independent

stations. Based upon the current structure of the industry, it would be hard for the networks to achieve these conditions.

Further, existing empirical evidence reveals no indication that the networks currently have this power. The growth of alternative video systems such as cable will further constrain the networks. Thus, if the networks have not attained market power to date, they are extremely unlikely to possess it in the broader video environment of the future.

Second, if antitrust concerns should materialize at some point, there remain effective ways of dealing with them; these include antitrust enforcement, renewed rulemaking and legislative oversight.

Third, staff found that the rules may actually impose costs on program supply. Evidence developed by staff indicates that the rules have altered supplier relationships, with ventures between studios and independent suppliers increasing markedly and with the proportion of programs produced solely by independents dropping markedly. These shifts are consistent with the hypothesis that the rules impose significant cost on the ability of smaller suppliers to reduce and shift the risk of program production.

In conclusion, the opinion of the staff of the Federal Trade Commission is that the economic case for retaining the rules has not been established. Thus, based upon staff's analysis of competitive and economic considerations, repeal of the rules would be the preferred action.

Thank you very much.

I would be glad to answer any questions you might have.

[The statement follows:]

STATEMENT OF ANDREW J. STRENIO, JR., ASSISTANT DIRECTOR FOR REGULATORY EVALUATION, BUREAU OF CONSUMER PROTECTION, FEDERAL TRADE COMMISSION

Mr. Chairman and Members of the Committee: Thank you for this opportunity to present the views of the Bureaus of Competition, Consumer Protection and Economics ("Staff") of the Federal Trade Commission ("Commission") on the Syndication and Financial Interest Rules ("Rules").[1] These views have already been presented to the Federal Communications Commission ("FCC") in the form of written comments[2] and reply comments,[3] and with the Committee's permission I would like to submit copies of those filings for the record. I would also like to point out that dissenting statements by Commissioners Michael Pertschuk and Patricia Bailey are attached to this material.[4]

My purpose today is to summarize for you the conclusions contained in those filings—conclusions that were reached as a result of the detailed analysis and empirical research presented in staff's submissions to the FCC. Taken together, the staff filings themselves add up to one hundred pages of material, not counting five technical appendices.

Let me note at the beginning that the testimony I am about to give represents staff views, and does not necessarily represent the views of the Federal Trade Commission or any individual Commissioner. The Commissioners have, however, voted to authorize me to deliver this testimony before you on behalf of the Commission staff.

As you know, the Federal Trade Commission has considerable experience and expertise in performing the kinds of competitive and economic analyses relevant to

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[1] The Syndication and Financial Interest Rules, 47 C.F.R. §73.658(j).

[2] *In the Matter of Amendment of 47 C.F.R. §73.658(j); The Syndication and Financial Interest Rules: Comments Before the FCC* (Jan. 27, 1983) (FTC Joint Bureau Comments).

[3] *In the Matter of Amendment of 47 C.F.R. §73.658(j); The Syndication and Financial Interest Rules: Reply Comments Before the FCC (Apr. 26, 1983) (FTC Joint Bureau Reply Comments).*

[4] Although Commissioner Pertschuk filed a dissent to the initial comments, and dissented from the reply comments, he did not file a written dissent to the latter.

some of the fundamental issues in the debate over whether to modify or repeal the syndication and financial interest rules. The Commission has also been active in the communications field as indicated by its comments to the FCC on a variety of matters.[5] The Commission's involvement in communications issues derives from its twin missions of fostering competition and promoting consumer interests. Those goals are directly relevant to the debate over the rules to the extent that both consumers and competition in the industry will be affected by how this issue is resolved.

In order to reach its findings and conclusions, the Commission staff extensively reviewed the arguments for and against the rules. The staff also performed original empirical research regarding possible costs of the rules, including inefficiencies that may be caused in the risk-sharing aspect of program production. This effort, conducted by lawyers and economists from all three bureaus, included contacts with representatives of many of the different parties to this debate and extended over a period of approximately six months.

I would like to emphasize that the staff's comments and review of the rules were explicitly limited to those areas in which the Commission's expertise in the areas of economic and competitive analyses was thought likely to assist the FCC in its proceeding. Staff clearly recognizes that the FCC's statutory responsibility may appropriately encompass other goals. Any action to implement such goals can be aided or hindered by the realities of the marketplace, however, which is why a sound understanding of relevant economic considerations is an essential part of this process.

The staff's conclusions can be stated simply. In the opinion of the three bureaus, the rules have not resulted in significant economic benefits, such as enhancing efficiency, promoting competition, or increasing consumer welfare. Regarding the hypothetical threat of network collusion in the supply of off-network programs to independent television stations, and manipulation of the advertising market, the staff concluded that network collusion would be extremely difficult to coordinate and maintain, and thus should be considered unlikely.

In addition to those factors that would make it very difficult for the networks to collude successfully, the injection of progressively greater amounts of competition into the industry as a result of the new video delivery systems and the continued presence of the antitrust laws and agencies to challenge any anticompetitive behavior would seem to make a prophylactic rule unnecessary. Moreover, economic analysis indicates that the rules could impose costs by disrupting efficient risk-sharing arrangements between networks and small independent program suppliers. For example, since they can not reduce their risks of production by selling rights to the networks under the terms of the rules, small independent program suppliers may have to either bear the increased risks themselves, or be compelled to co-produce their programs with larger producers and thereby increase concentration in the program supply market.

The Commission staff thus concluded that a strong case for continuing the present rules has not been made, and recommended that the rules be repealed. Staff also noted that if the FCC nonetheless decided that modification rather than repeal is the most appropriate step at this time, a broad range of reasonable options exist which, in varying degrees, would still be improvements on the existing syndication rule. The Department of Justice, for instance, presented several of these options. One of those options, which the Commission staff stated would be an improvement on the status quo, has been essentially incorporated in the FCC's Tentative Decision.[6]

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[5] *See, e.g., In the Matter of Amendment of Part 76, Subpart J, § 76.501; Rules and Regulations Relative to Elimination of the Prohibition on Common Ownership of Cable Television Systems and National Television Networks: Comments Before the FCC* (Dec. 14, 1982) (FTC Joint Bureau Comments); *In the Matter of Proposed Rulemaking Relative to Domestic Fixed Satellite Transponder Sales: Reply Comments Before the FCC* (Apr. 16, 1982) (FTC Joint Bureau Comments); *In the Matter of Amendment of § 73.3597; The Three Year Rule on Applications for Voluntary Assignments or Transfer of Control: Comments Before the FCC* (Mar. 1, 1982) (FTC Joint Bureau Comments); *In the Matter of Selection of Initial Licensees Using Random Selection or Lotteries Instead of Comparative Hearings: Comments Before the FCC* (Dec. 30, 1981) (FTC Joint Bureau Comments); *The Role of Ownership Rules in Promoting Diversity and Other Competitive Values in the Media: Submitted to the Subcom. on Telecommunications, Consumer Protection and Finance of the House Comm. on Energy and Commerce* (Sept. 30, 1981) (Comments of Heather Kirkwood and Kathryn Fenton, FTC Staff); *Testimony on Media Concentration: Hearings Before the Subcomm. on General Oversight and Minority Enterprise of the House Comm. on Small Business* (Jan. 2, 1980) (Statement of Jonathan Gaines, FTC Staff); and *In the Matter of Proposed Rulemaking on Airing of Public Service Announcements by Broadcast Licensees* (Nov. 1, 1978) (FTC Staff Comments).

[6] Tentative Decision and Request for Further Comments, Amendment of 47 C.F.R. § 73.658(j)(1)(i) and (ii), The Syndication and Financial Interest Rules (Adopted Aug. 4, 1983).

I would like now to expand briefly upon the reasoning the staff used in its review of the rules. In examining the rules' asserted benefits, the staff's analysis focused primarily on the "warehousing" argument (that is, that the networks would choose to withhold their programs from syndication) presented by those opposing repeal. This monopolistic strategy would succeed only if the networks are able to monopolize recent network prime-time series and withhold the "marginal" programs from the independent stations. In addition, the networks would have to exercise monopsony power in the acquisition of program rights, monopoly power in the distribution of off-network programs, and monopoly power in the sale of advertising time. Based upon the current structure of the industry, it would be hard to achieve any one of these conditions, let alone all three at once. Further, existing empirical evidence reveals no indication that the networks currently exercise monopsony power in the purchase of program rights or can wield monopoly power in the determination of spot advertising rates.

Another crucial consideration in evaluating the networks' alleged monopoly power is the question of the relevant market. The staff believes the market definition employed in conducting this analysis must give adequate weight to the growth and significance of alternative video delivery systems (such as cable). It seems likely that these new technologies will constrain the networks' ability to exercise market power in several ways: (a) by providing alternative sources of employment for program suppliers and their associated talent; (b) by providing competitive programming to independent stations; (c) by increasing competition for viewers; and (d) by providing new vehicles for advertisers. It seems, then, that if the networks have not possessed monopoly or monopsony power to date, they are extremely unlikely to possess it in the broader video environment of the future.

Moreover, if antitrust concerns should materialize at some point, there remain effective ways of dealing with them. These include: antitrust enforcement, not only by federal and state agencies, but also by private parties who feel aggrieved by network conduct; renewed rulemaking, conducted at a time when the nature of both the problem and the necessary remedy would be far more clear than at present; and legislative oversight, which will be needed in any event to monitor developments in this important and rapidly changing industry.

A related argument voiced by those opposing repeal is the assertion that the syndication and financial interest rules have contributed to the availability of off-network programs, and this availability in turn has been a critical factor in th growth of independent stations. To assess the validity of this claim, the FTC staff examined the growth of independent stations by applying conventional statistical tehniques (multiple regression analysis). This analysis provides a strong indication that factors other than the availability of off-network programming—such as the growth in the number of television households, revenues per household, and cable television households—are important factors contributing to the growth in the number of independent stations.

Staff found that not only was there a lack of proven benefits, but also that the rules may impose costs on program supply. Staff's analysis revealed shifts in the program supply industry that are consistent with the hypothesis that the rules have interfered with the efficient distribution of program development and program risk. Careful analysis of existing data reveals that during the 1969–1970 television season, just prior to the rule's implementation, only ten percent of prime time programs were jointly produced by independent suppliers and movie studios. During the same season, independent suppliers without assistance from the studios accounted for sixty-six percent of prime time programs. By the 1975–1976 season, this pattern had changed to a statistically significant degree. The percent of joint ventures between studios and independents had risen to thirty-four percent and the percent of programs produced solely by independents had fallen to forty-seven percent.[7] The likelihood of this change being a result of the rules is increased by the fact that program supply patterns have not subsequently changed after the 1975–1976 season. There was no statistically significant change in the percentages of programs supplied by the various groups of producers between the 1975–1976 and 1981–1982 seasons.

In sum, this evidence indicates that the rules have altered supplier relationships, with ventures between studios and independent suppliers increasing markedly and with the proportion of programs produced solely by independents dropping markedly. These shifts are consistent with the hypothesis that the rules imposed significant

[7] These figures do not add to 100 percent. That is because network-produced programs or programs produced jointly by networks and non-network suppliers are excluded from these calculations, even though they are part of the total number of programs produced in each season.

costs on the ability of smaller suppliers to reduce and shift the risk of program production.

In conclusion, the opinion of the staff of the Federal Trade Commission is that the economic case for retaining the syndication and financial interest rules has yet to be established. Despite assertions to the contrary, there is no persuasive evidence to establish that in the absence of the rules networks, would limit the supply of off-network programs. Similarly, there is not convincing support for contentions that the networks would exercise monopsony or monopoly power over the purchase of programs or sale of advertising time to the detriment of independent stations and consumers. Moreover, there are costs to continuing the rules. Thus, based upon staff's analysis of these competitive and economic considerations, repeal of the rules would be the preferred course of action.

Thank you very much. I would be glad to answer any questions you might have.

Senator GOLDWATER. Mr. Chairman.

The CHAIRMAN. Mr. Strenio, basically what your statement is—and I will repeat it again—it is a staff statement authorized unanimously by the full Commission to be presented, is that correct?

Mr. STRENIO. Yes, sir.

The CHAIRMAN. And basically your statement is that you still support the FCC decision.

Mr. STRENIO. Yes, sir.

The CHAIRMAN. All right. And that is as an independent Commission, which is not in quite the same position to be influenced as perhaps somebody directly in the administration.

Mr. STRENIO. We are an independent Commission, and that is the stance that has been taken, sir.

The CHAIRMAN. Mr. Attorney General, let me ask you this question about a consent decree—what exactly is it?

Mr. BAXTER. A consent decree is a negotiated settlement of an antitrust case between the Government, on the one hand, and the defendants in the case, on the other. Rather than bringing the case to a full trial, we agree to some form of relief, then go into court and propose it to the court to be entered as the court's judgment in the case.

The CHAIRMAN. Unless the consent decree specifically admits guilt, is a consent decree an admission of guilt?

Mr. BAXTER. No, it is not, generally speaking, although, of course, on occasion we insist upon an acknowledgement of the violation as a provision in the consent decree. But, in general, that is not the practice.

The CHAIRMAN. You are an experienced lawyer and teacher in the field of antitrust laws. Can you ever recall an antitrust consent decree being reopened by the judge on the judge's own part without the acquiescence of the parties?

Mr. BAXTER. No; certainly I am unaware that that has ever happened. It would be very unusual.

The CHAIRMAN. The consent decree that was entered into more or less adopted the rules of the Federal Communication Commission, did they not?

Mr. BAXTER. The consent decrees that we are talking about duplicate the financial interest and syndication rules, but go on to prohibit the networks from a variety of other practices that are not under discussion today.

The CHAIRMAN. So for the networks to have permission to syndicate, it is not enough for Congress to pass legislation, or to turn

down legislation, or for the FCC to act. The consent decrees would have to be changed.

Mr. BAXTER. Of course, the Congress could overturn the terms of the consent decrees by legislation.

The CHAIRMAN. I should rephrase my question. The fact that the FCC acts does not overturn the consent decrees.

Mr. BAXTER. No; the consent decrees would remain in place, and a change in the FCC rules would not, on their own, modify the consent decrees.

The CHAIRMAN. Now, to the extent that the administration wants 2 more years before these rules go into effect, all they have to do is direct you not to change the consent decree, and it will not be changed, is that correct?

Mr. BAXTER. Well, of course, that would not keep the rules from becoming operative in some theoretical legal sense, but as a practical matter, yes.

The CHAIRMAN. You are right. In a theoretical operative sense. But the networks still could not syndicate. They could not do anything in violation of the consent decree.

Mr. BAXTER. That is correct.

The CHAIRMAN. And if President Reagan says that consent decree is not going to be changed, the Government will not enter into an agreement to change that.

Mr. BAXTER. The White House has not encouraged, initiated, or participated in any discussion whatsoever about the consent decrees. So far, our attention has been focused on the FCC proceedings.

The CHAIRMAN. But all I am saying is that nothing will change unless the consent decree is changed, and the consent decree cannot be changed unless the parties agreed to it.

Mr. BAXTER. No; I think that is a slight overstatement. It is a theoretical possibility at least, that one of the parties to a consent decree could go in to court and ask the judge for a modification of the consent decree. And under some criteria the judge would be inclined to do that, notwithstanding the Government's objection.

The CHAIRMAN. Except the Government is a party in this case.

Mr. BAXTER. The Government is a party. That is quite correct. But there are circumstances under which a decree can be changed over the objection of the Government. But again, it would be quite unusual. The private parties would have a very heavy burden to bear to get a judge to do that.

The CHAIRMAN. Well, the producers are not a party to this consent decree, are they?

Mr. BAXTER. No.

The CHAIRMAN. The networks are.

Mr. BAXTER. That is correct.

The CHAIRMAN. And you said earlier to the best of your memory no judge ever changed a consent decree on his or her own motion, all by his or herself.

Mr. BAXTER. I did say that.

The CHAIRMAN. So that it would be extraordinarily unusual, unheard of, unprecedented for a consent decree to be changed without the involved parties participating in the change.

Mr. BAXTER. It would be totally unheard of and unthinkable, indeed, to have one changed without the participation of the parties.

The CHAIRMAN. And therefore if the Government will not participate, it will not, for all practical purposes, be changed.

Mr. BAXTER. Well, now you have changed the meaning of the word participate. I mean if the networks filed motions to modify the consent decrees in some way, we would be served with those motions and afforded an opportunity to come in, to be heard, and to participate. If one chooses to default on that opportunity, why, one has nevertheless had the opportunity to participate.

The CHAIRMAN. Well, let me rephrase it. The judge is unlikely to change a consent decree without at least the acquiesecence of the parties involved.

Mr. BAXTER. The judge is very unlikely to change a consent decree without the acquiescence of the Government, in particular.

The CHAIRMAN. Thank you.

Now, Mr. Markey, the reason I asked that question earlier about who speaks for the administration, is because I have called upon the Department of Commerce to speak for the administration, because I assumed they were speaking for the administration. And you also are speaking for them today. Your statement says so.

Mr. MARKEY. On this, on the legislative proposal we are, yes, sir.

The CHAIRMAN. So when I would call the Department of Commerce—on occasion I talked to the Secretary or others—I would ask what is your position. I did not mean to distinguish between the Department of Commerce and the administration's position. I assumed the position that you were giving me was the administration's position.

Mr. MARKEY. Well, let me comment on that because before I got to the Department of Commerce as I understand it, the subject came up at a Cabinet council meeting, and it was decided at that meeting that there was no administration position as such on the FCC regulations and on the rulemaking, but that each of the departments that were interested at that point in participating could participate and take their own positions, which the Department of Commerce then did, and the Department of Justice did.

But it was understood at that point that there was no administration position as such on what we were——

The CHAIRMAN. So in those days when I was asking what is your position and you came back and said our position is—that was the Department of Commerce's position.

Mr. MARKEY. Yes, sir.

The CHAIRMAN. Now, is the Department of Commerce position today the same as the administration's position today?

Mr. MARKEY. It is certainly the same on this legislation, yes.

The CHAIRMAN. Now, 2 weeks from a day ago I called the Department of Commerce and asked what is your opinion on this rider that was going to be put on the appropriations bill. Your position was in opposition.

Mr. MARKEY. Yes, sir.

The CHAIRMAN. Now, what facts have occurred in the last 2 weeks to change the Department of Commerce's position on this issue?

Mr. MARKEY. Well, no facts except the point that our boss, who is the President, has decided that there is a change and now there is an administration position on this issue. And having worked around this town for a number of politicians over 15 years, when that decision is made, that becomes our position.

The CHAIRMAN. I understand perfectly. That is a very fair and honest answer. There have been no change of facts, right?

Mr. MARKEY. There is no change in facts, but I think that, as I pointed out in my statement, that reasonable people can certainly differ over what the facts are and the interpretation.

The CHAIRMAN. I understand that, but in terms of the presentation of new facts, starting with the special staff inquiry and the FCC hearings, do you know of anyone who has not been allowed to testify who wanted to testify?

Mr. MARKEY. No, sir.

The CHAIRMAN. Do you know of any new positions that are being presented that have not been presented before?

Mr. MARKEY. No, sir.

The CHAIRMAN. There are no new positions that I know of.

Mr. MARKEY. No new positions. But again, as has been pointed out here, this is a very fluid industry, and you can look at facts and what is happening in the industry and make two different interpretations of what they mean.

The CHAIRMAN. Well, my time is up. I will have some more questions in a moment, Mr. Markey. You have been very fair and very forthcoming. Up until 2 weeks ago the Department of Commerce's position was against, even regarding the rider on the appropriations bill. That position has changed because, as you said, your boss has changed. There have been no new facts. There have been some extraordinary new pressures, but no new facts.

Mr. MARKEY. No new facts, but just new, probably thinking about some of those facts.

The CHAIRMAN. Yes, I understand that exactly.

Senator GOLDWATER. Mr. Ford, do you have any questions?

Senator FORD. Maybe one or two, Mr. Chairman.

Senator GOLDWATER. Ten-minute rule.

Senator FORD. OK. You call me down if I go over 10 minutes.

Senator GOLDWATER. I will call you.

Senator FORD. I knew you would. That is the reason I told you you could.

I want to followup on Senator Packwood's questioning. I understand the boss telling you to do something. You work for him, be faithful to him or quit. That is a good rule, and Mr. Markey, I admire you for that.

How difficult, or was it not difficult at all, when on January 26 you stated that: "the rules have failed and do not serve the public interest"—a statement from the Department of Commerce. "The networks do not possess market power or program suppliers, and even if they did, this rule—the rules are unlikely to reduce such power." That was March 14, 1983.

"The Department of Commerce recommendation goes beyond the FCC's tentative decision." That is April 26, 1983.

"The rules are irrelevant to creative control," January 26, 1983.

And I could just go on and on.

Mr. MARKEY. I am sure you can.

Senator FORD. Because this is what you have said, and you supported the FCC until no new facts were involved. The boss said let us hold up on it and give them a moratorium for 2 years.

Now, Mr. Baxter, is your position the same as Mr. Markey's now?

Mr. BAXTER. Well, I would certainly not have agreed with Senator Packwood's suggestion that the President has changed his mind.

Senator FORD. Well, I do not think he said the President has changed his mind. The President has just said let us give a 2-year moratorium, according to Mr. Markey's statement of representation of the administration.

Mr. BAXTER. Yes. I think the truth of the matter is that this matter has been under careful consideration and has been discussed. The positions we were taking were known to the President. Because of their complexity, these are things about which one cannot feel very certain. And the real difference is not a difference in position, but a difference in the level of certainty that we really understand adequately what is going on. And the determination that the President made, and entirely properly so, was that there just was enough complexity and enough uncertainty about whether we really understood the industrial situation that a 2-year moratorium was necessary.

Senator FORD. Mr. Baxter, let me ask you how long did it take the Department of Justice in staff time and your time and others' time to ascertain the positions that you have already taken?

Mr. BAXTER. We invested a very considerable amount of time, and certainly I spent a great deal of time on it myself, in part because of the perceived complexity and difficulty of the problem.

Senator FORD. How much time would you say? You say a considerable amount of time. How large an amount of time? How deeply did you get into it? Was it months or was it years?

Mr. BAXTER. Well, we have been working at it for a period of several years, but needless to say, I mean I probably have an average of 50 problems on my desk at any given point in time, and although it has been under consideration for several years, it would be very misleading to say I have spent several years studying it.

Senator FORD. But you did not mark the little pencil down like the lawyers do at home on how many minutes you worked on it or that sort of thing, and then set it aside so you could put that into the cumulative time in the bill?

Mr. BAXTER. We do that for everybody in the Antitrust Division except me, Senator.

Senator FORD. Well, I can understand that. But the point I think that was made here, was that you in your position, a respected high authority in the Justice Department, have over the years made a judgment or at least your argument. That argument was in favor of the tentative rule.

I can go back and take the same Department of Justice rule, the Department of Justice statements, and we start here as late as September 20, 1983.

Mr. BAXTER. There is no question about that, Senator.

Senator FORD. So the point I think we are making here is that nothing has changed except we just had a better lever, and we did not let the rules follow.

Now, the chairman of this distinguished committee made a plea, and I supported him. I have been an opponent of the so-called legislative veto since I have been here because we have had the authority since we were elected to veto anything we wanted to by law, so we can change it any time we want to. And so we broke rule 15 in the Senate after the Commerce Department had gone through years and made positive statements, after the Justice Department had gone through years and made a positive statement, and the FTC comes forward with a positive statement. Then the FCC gives its tentative rule. Nobody is complaining about not having time to testify. Everybody comes down basically in the same position; yet we get rolled over. I understand it was not on the rule, it was on the issue.

I want to say to you right now, Mr. Chairman, there will be a bill, and the Rules Committee, on which I sit as a member, will be able to look at that. When it comes to rule 15 on jurisdiction, and rule 16 as to germaneness, it is going to take a supervote to override the Chair if I can get it passed and I can get some support.

The thing that really rankles me here—and I am sure if I was on the other side it would not rankle me—but nevertheless, I had given up a lot because you and I have talked about other things on the floor is that you agreed with my position and voted against me. I admire you for that because you were taking care of constituency. That is what Senator Wilson is doing, taking care of constituency. If they want to make a movie in Kentucky, hell, let them come on. I am for it.

We have got everything. We have got hills, flatlands, bluegrass, horses, beautiful women, whiskey, and cigarettes. Everything you see in a movie you can get in Kentucky, and just let them move on. I have not had any offers like that.

Senator WILSON. There might even be a bit part for a former Governor.

Senator FORD. Well, which one did you have in mind? It could be John Y. Brown and Phyllis, you know.

I think they probably would overlook me. But I hope we do not lose our good humor here, Mr. Chairman.

But I would just say that that is my point of contention. We have these distinguished people representing the administration being up front with us that the reason they are here is that the boss said to be that way. If you cannot work for him, quit. And I admire that. But somewhere along the way we as U.S. Senators are going to say we are going to have rules, we are going to have to have rules, and I just think their taking jurisdiction away from this committee or any other committee was wrong.

I intend to make a valiant effort and see if we can stop it. That is my bone of contention for the whole thing.

Senator GOLDWATER. Well, I think you have done a very fine job, and although your 10 minutes are not up, I think it is a good time to rest your case.

Senator FORD. You remind me of my father, General. After you have made the sale they say when do you want me to pay you.

Senator GOLDWATER. Well, I would not go that far.

But I would make a comment that just because the FCC spent years on this does not eliminate a role for Congress. All the wisdom is not in the FCC, nor in the other branches and agencies of Government. We can make our independent review in Congress and reach our own judgments. Maybe the FCC has decided wrong.

Mr. Justice, do any provisions of the consent decree contain "phaseout" expiration dates?

Mr. BAXTER. Yes. But the critical ones do not, and I do not have sufficiently freshly in mind exactly which ones have expirations on them and which do not, to do justice to any detailed questions along those lines, although, needless to say, I would be delighted to give you written comments.

Senator GOLDWATER. If you would add that to your pile and research it, I would appreciate it, because I do not believe there is any phaseout expiration date.

Mr. BAXTER. Certainly not on the major provisions.

Senator GOLDWATER. But you will supply an answer for that.

Mr. BAXTER. Yes.

[The following information was subsequently received for the record:]

THE MAJOR PROVISIONS OF THE FINAL JUDGMENT ENTERED AGAINST NBC,[1] CBS,[2] AND ABC[3] TERMINATE ON THE FOLLOWING DATES

Subject	Section	NBC	CBS	ABC
Syndication and financial interest	IV	(4)	(4)	(4)
In house entertainment programs	V	Nov. 14, 1990	Nov. 14, 1990	Nov. 14, 1990.
Conditioning, general	VI A	(4)	(4)	(4)
Conditioning program purchases upon use of facilities	VI B	Nov. 28, 1983	July 31, 1995	Nov. 14, 1995.
Facilities rental term limitation	VI C	Nov. 14, 1995	Nov. 14, 1995	Nov. 14, 1995.
Reciprocal purchases with other networks	VI D	Nov. 28, 1987	July 31, 1990	Nov. 14, 1990.
Renewal options	VI Ei	Nov. 14, 1995	Nov. 14, 1995	Nov. 14, 1995.
Program exclusivity	VI Eii	Nov. 28, 1992	July 31, 1995	Nov. 14, 1995
Theatrical film exclusivity	VI Eiii	do	do	do.
Pilot-to-series option	V F	Nov. 14, 1990	Nov. 14, 1990	Nov. 14, 1990.
First negotiation—first refusal	VI G	do	do	do.
Repeats of earlier years' episodes	VI H	do	do	do.
Talent exclusivity for series	VI I	None	do	do.
Talent exclusivity for pilots	VI J	do	None	do.
Notice to employees and suppliers	IX	Dec. 28, 1987	Aug. 31, 1990	Dec. 14, 1990.

[1] United States v. NBC, 449 F. Supp. 1127 (C.D. Cal. 1978), aff'd mem., No. 77-3381 (9th Cir., April 12, 1978), cert. denied sub nom.; CBS v. United States Dist. Ct. for Cent. Dist. of Cal., 44 U.S. 830 (1979).
[2] United States v. CBS, Inc., Civ. No. 74-3599-RJK (C.D. Cal. 1980), reprinted in 45 Fed. Reg. 34465 (1980).
[3] United States v. ABC, Inc., Civ. No. 74-3600 (C.D. Cal. 1980), reprinted in 45 Fed. Reg. 58441 (1980).
[4] No termination date.

Senator GOLDWATER. Mr. Strenio, the FTC's comments to the FCC were endorsed by three Commissioners and opposed by two?

Mr. STRENIO. Yes, Senator.

Senator GOLDWATER. I agree that deregulation generally is beneficial because the free marketplace should be allowed to operate, but do you really think that broadcast television, which is dominated by only three companies because of the Government's channel allocation policies, is a competitive and free marketplace?

Mr. STRENIO. In the staff view the situation that exists in the broadcast industry now does have, we think, sufficient competitive

aspects. It is true that there are only the three networks in direct television provision; yet they are not a monolith by any means. They compete with each other—by the evidence that we have, very vigorously. And they are continually out to get an advantage over the other. Each network has very clear incentives to outperform its rivals.

There is also, as has been alluded to earlier, the emergence and increasing significance of cable and multipoint distribution systems, and the various other new technologies coming in that are taking market share and advertising revenues from the networks.

So, in the view of the staff, the situation with the three networks is not one where there would be a presumption that full and fair competition could not exist in the absence of the rules.

Senator GOLDWATER. It does not exist?

Mr. STRENIO. No. The staff position is that we do not need the total safeguard of the rules as an absolute guarantee for competition. We think that significant competition, full and fair, would exist even without the rules.

Senator GOLDWATER. Well, I might ask Justice a similar question. After the FCC first issued the rules, the Antitrust Division obtained consent decrees with the networks which in some aspects surpassed the FCC rules in restricting network syndication and other conduct.

Now, are you considering changing these rules sooner than they would otherwise be phased out?

Mr. BAXTER. Well, of course, those prohibitions, as I recall, are permanent prohibitions in the consent decrees. I do not think they disappear of their own course. That is the point I agreed to look up for you, Senator.

But it is true, the cases were brought, and that was the nature of the consent decrees that were negotiated. Now, of course, that was started in the middle 1970's, and the underlying premise of those cases was that a fewness in numbers among competitors—here, only three networks—sort of necessarily meant that competition would not be vigorous. And there is really not much basis for the notion that mere fewness in numbers itself, three, eliminates competition.

The question is whether it will be in the financial interest of each of the individual networks to compete or whether they will find some vehicle for cooperative behavior. While collusion is one extreme, merely being good guessers about what the others are doing, and all sort of moving in lockstep is perhaps a possibility. However, that would not necessarily be indicative of collusive behavior.

So that in the last 10 years, it has become clearer and clearer that you do not know enough when you just know that there are a few competitors. You have to ask what kinds of business decisions are we talking about and will these be the kinds of business decisions as to which it is easy for people to behave cooperatively, or would they find it difficult to behave cooperatively.

Also, the nature of the decisions about which there would have to be cooperative behavior to attenuate competition are very, very complex, so that, in my judgment, one should not be surprised to

find that although there are only three networks, there seems to be quite vigorous competition among them.

Senator GOLDWATER. Now, I might follow on that. We do not have only three networks because of a free marketplace.

Mr. BAXTER. No, of course not. We have only three because in our spectrum allocation decisions and in other ways, through governmental processes, they have been limited to three.

Senator GOLDWATER. In 1952 we created, in effect, three networks with no competition. So what we have today are three companies who own and operate the only networks, and, in effect, control the market, because it is what they have to offer to the independent stations that determines whether or not the independent station is going to have any kind of an audience or not.

You do not consider this free market competition, do you?

Mr. BAXTER. Yes. I think the three networks in most respects compete with one another quite vigorously.

Senator GOLDWATER. That is not the point. Suppose a fourth one tried to come in. Can he come in?

Mr. BAXTER. Well, there is nothing, I think, that would prevent someone from attempting to form a fourth network by gathering up a series of independent stations. It is, I think, no longer legally impossible to have a fourth network, but I do not think we are at all likely to see one because of the spectrum allocation decisions and the other rules we have made over the years.

Senator GOLDWATER. What about the allocation of channels?

Mr. BAXTER. Well, as I say, there are governmentally-controlled resources there that would make it extremely difficult for a fourth network to exist.

Senator GOLDWATER. In other words, it is not a free market situation.

Mr. BAXTER. No, it is not in many respects. It is still a highly regulated industry.

Senator GOLDWATER. I have no other questions.

Senator Wilson I believe has a few questions.

Senator WILSON. Thank you very much, Mr. Chairman.

Mr. Strenio, do you really believe that the television industry, with only three networks, is a competitive market?

Mr. STRENIO. In the present situation, Senator, we do think that. As Senator Goldwater has pointed out, the existence or nonexistence of a fourth or fifth network has resulted from the spectrum allocation rule, but that is something beyond the scope of this present rule.

Senator WILSON. I understand that. The current state is not the fault of the Federal Trade Commission. We are the ones that allocated the spectrum. But you are talking about three networks that are the entire market.

Mr. STRENIO. Well, I would disagree with that characterization respectfully, Senator. I think in terms of the entire marketplace you have to be looking at the other distribution systems, cable and so forth. I think that we have all seen that the market share of the networks has dropped significantly in the recent past, and that trend will likely continue.

Senator WILSON. Have you seen the networks own statistics, their own projections as to the market share in the 1990's?

Mr. STRENIO. I have seen different figures on that.

Senator WILSON. Have you seen theirs?

Mr. STRENIO. I have seen them second hand.

Senator WILSON. Well, if you have seen their own, then they are not really suffering.

Let me ask you this. Do you not think that the independent television stations have a point in their contention that during the pendency of these rules, the rules have helped them to grow and flourish?

Mr. STRENIO. The independent television stations?

Senator WILSON. Yes.

Mr. STRENIO. We looked at that in our reply comments, Senator, and our conclusion was that there are a number of factors that have contributed to the growth in the number of independent stations and to their success. We did a multiple regression, a fairly standard statistical analysis, and we found that a number of factors were very significant in terms of being related to that growth in the strength of the independent stations.

Senator WILSON. What weight did you give to the factor of the ability to obtain programing that will attract an audience?

Mr. STRENIO. The ability to obtain programing?

We looked at that in a separate section. We went back and did an analysis of what is currently shown on the independent stations in the prime time portion of the market, the time that the Committee for Prudent Deregulation had been focusing upon. We noted an indication that approximately 20 percent of that programing in the times that the people were most concerned about the effects of the repeal of the rule, the times that those people were concentrating on, approximately 20 percent of the programing is already other forms than off network programing, such as movies and first run syndication.

Our analysis, given that and given the prospects with repeal or modification of the rule for additional program supply, was that the independent stations did not appear to be in any real danger of losing a source of significant favorable programing.

Senator WILSON. On what do you base that? Did you look at the history that led to the creation of the FCC rules on financial interest and syndication?

Mr. STRENIO. Yes, Senator, and looking at that history, we uncovered during our research no evidence that in fact the networks had obtained or exercised the kind of monopolistic power that is the basis for the concerns that have been expressed. We also found that prior to the imposition of the rules the networks had only acquired on the order of 25 percent of the syndication rights, and that there did not appear to be a concerted drive prior to the rules to exercise that sort of power.

We also noted that there appears to be a contradiction in the arguments of the people who are concerned about the repeal or modification of the rule. On the one hand, at least in some of the materials that I have seen in submissions to the FCC, the argument is made that there really is not much competition with the networks, that cable and independent stations are relatively insignificant players in the market. On the other hand, the allegation is made that because of the growth and increased prospects for growth of

the cable and independent stations, that the networks are out to get them or would have incentives out of fear of those alternatives to come in and try anticompetitive behavior in order to ward them off. There seems to be an inherent conflict between saying that these alternatives are significant on the one hand and not significant on the other.

Senator WILSON. Did you consider ownership of new technologies, both present and some projected by the networks?

Mr. STRENIO. No, Senator, we did not.

Senator GOLDWATER. I am sorry, Senator, your time has expired.

Do you have anything else, Mr. Chairman?

The CHAIRMAN. I just want to make sure I understand the FTC. You think you would have no trouble in terms of antitrust enforcement or ferreting out any collusive activity on the part of the networks?

Mr. STRENIO. That is a judgment call, Senator, and it is not entirely one sided. Our assessment is that given what we view as the relatively very improbable chain of circumstances that could lead to problems in the nature of antitrust enforcement, and given our assessment that the existence of the current rules imposes some actual costs at present and will continue to do so as long as they exist, then in our judgment, on economic factors, we think it is worth changing those rules.

The CHAIRMAN. Thank you.

Senator GOLDWATER. Senator Ford?

Senator FORD. Mr. Markey, you said the Cabinet Council had a meeting among those subgroups and there was no position on this question.

Can you give me the date of that meeting, or approximately?

Mr. MARKEY. It was before I came to the Department of Commerce. I think it was back in February.

There was a subsequent meeting that I think was fairly well publicized a couple of weeks ago on the same subject.

Senator FORD. There was no position a couple of weeks ago?

Mr. MARKEY. No, it was just a discussion.

Senator FORD. Just a discussion.

OK, thank you, Mr. Chairman.

Senator GOLDWATER. If there are no other questions, you gentlemen are excused, and thank you very much.

Now we will listen to Prof. Thomas Krattenmaker, Georgetown Law Center, who has to return to class, so we will keep the questions short and the testimony short.

Professor Krattenmaker?

We will put your entire statement in the record as if read, if you would like to proceed in a general way.

STATEMENT OF THOMAS KRATTENMAKER, PROFESSOR, GEORGETOWN LAW CENTER, WASHINGTON, D.C.

Mr. KRATTENMAKER. Thank you, Mr. Chairman.

I thought that I might summarize what I thought were some of the principal points of the testimony, if I could.

If I may, I would like to begin by thanking the members of the committee and the members of the committee staff for so gracious-

ly helping to accommodate my rather unusual schedule today, and I appreciate very much the efforts that have been made to make it possible for me to be here.

Mr. Chairman, I thought I would talk basically about the substance of the rule, and then might answer questions with respect to these procedural issues that have come up later on.

For reasons difficult to identify, the Federal Communications Commission has spent very large sums of money for the past 15 years mediating a garden variety, penny ante commercial dispute between two groups of firms I should have thought were perfectly capable of protecting their own pocketbooks. One group consists of major producers of television programs such as Gulf & Western, MCA, and Coca-Cola. The other consists of three corporations that operate national commercial television networks, ABC, CBS, and RCA.

Now I am given to understand the U.S. Senate, the greatest deliberative body in the world, has decided to review the FCC's mediation efforts. To my astonishment, I discovered that the question of interest to the Senate was not why the FCC ever embarked on this venture, but rather, whether the Commission should not continue it.

As codirector of the FCC's network inquiry special staff which was activated in June 1978 and concluded its work in November 1980, I analyzed many questions concerning Government regulation of commercial television network structure and behavior that are fascinating and complex. The syndication rule, however, is neither.

Adopted without even a formal pretense of concern for the welfare of television viewers, the Commission's professed reasons for adopting the rule virtually carry their own refutations. For one concerned with how to make television viewers better off, this rule is an easy case.

If we put aside the issue of the viewers' welfare, it becomes clear that we are dealing principally with inflated rhetoric from both sides.

What effect does the rule have on program suppliers and networks? Our analysis showed that the rule does not change the expected profitability of network program production; it only changes the manner in which that profit is earned.

With respect to the television networks, ABC and CBS and NBC will gain little from repeal of the rule. To exercise syndication rights, they must first acquire them, and these networks' abilities to compete are dependent largely on the strength of their affiliates and the quality of their programs, not their ability to resell these programs in Europe.

The principal point, however, remains. Whatever effects the rule may have had, television viewers have not derived any benefits from it. The syndication rule has not led to more diverse program types on the networks or in syndication, nor has it increased the number of viewing options available to the public at any given time, or increased competition among networks or program suppliers or stations. Indeed, the rule was not intended to achieve any of these goals. The Commission has never said that it was.

Given the present three-network system, the program offerings of the networks are intended to maximize advertising revenues. There is simply no reason to believe that even if the rule succeeded in shifting profits, program suppliers would not also continue to produce the same program types that maximize these revenues.

In sum, the syndication rule has not and will not further the welfare of the viewing public. The question remains, Does it harm the public? It probably harms the public a little bit by raising the cost of networking somewhat, but these effects would be hard to understate.

I can see two ways to resolve the issue efficiently. The easiest is to repeal the rule, leaving these financial behemoths to look after their own price-earnings ratios without the aid of a Government sugardaddy.

If that solution is too easy, then I suggest the following: Let the contending parties bid in an auction for the right to decide whether the rule should be retained or repealed. The high bid will come from the group of firms most competitively disabled by the rule, so an efficient outcome will be assured, and the proceeds of the auction can be given to charity. That way the public may at last derive some benefit from this rule.

I would also suggest that as that auction is conducted, we may proudly proclaim the new-found merits of trickle-down regulation.

Thank you, Mr. Chairman.

Senator GOLDWATER. Thank you very much, Professor.

I will announce now that we are going to go through lunch hour, so anybody on the panel, do not leave. You might get hungry, but we get hungry, too.

Mr. Chairman, do you have any questions?

The CHAIRMAN. Professor Krattenmaker, you were codirector of the special staff inquiry which was funded principally at the request of Senator Hollings. He pushed hard for that $2 million.

To the best of your knowledge, did anybody interested or affected by this rule not have a chance to appear?

Mr. KRATTENMAKER. No, sir. We took substantial efforts to broadcast widely our availability. We never had a request for a meeting that we declined. We spent 2 or perhaps 3 weeks on the west coast where part of the time was just sort of an open house for people to come by if they cared to.

I do not have all those records with me, Senator, but one of the things we were proud of is that not only did we see anyone who wanted to see us, but we never put out a report to the Commission that had not first been released to the public for public comment, both with respect to the facts and with respect to the policy arguments therein, for I think at least a 6-month period.

The CHAIRMAN. I went through the list of those who appeared. I could not think of anybody who might have wanted to appear that I did not see on that list. The independent television stations appeared.

Mr. KRATTENMAKER. Yes, we tried to, Senator, and we tried to contact people who might be interested. We might have missed somebody, but that is correct, INTV was represented.

The CHAIRMAN. Now, second question, unrelated to that. You indicated that before the rules were adopted in 1970, the networks paid for their financial interests and their syndication rights.

Do you see any reason why they would not pay for them again if the rules are abolished?

Mr. KRATTENMAKER. Certainly, that is correct. There is no reason to assume these rights are being given away. If they are, I would like to know where the line forms.

The CHAIRMAN. I am curious. You mentioned some of the large producers.

Who are the producers? The impression has been given they are very small, independent, almost shoestring kinds of operations.

Mr. KRATTENMAKER. Senator, I did not bring our report with me because I was afraid I might get a hernia. It is about 600 pages long. But I would be happy to supply copies to the committee.

One of the things that we did is that we did studies of who was producing how much of the programing for the networks. There is a rather complete list of the groups that constitute program suppliers. Some of them are very small outfits.

The major program suppliers, however, are as I indicated in my statement, very large firms, oftentimes affiliated even with larger firms. Paramount is a major supplier of prime time programing for the network. It is a subsidiary——

The CHAIRMAN. But Paramount is owned by Gulf & Western.

Mr. KRATTENMAKER. It is a subsidiary, however, of Gulf & Western, that is correct. And Coca-Cola is a major producer of television.

The CHAIRMAN. You mean to say they, Coca-Cola and Gulf & Western, either produce or own major companies that produce shows for prime time?

Mr. KRATTENMAKER. Yes, that is right, yes.

The CHAIRMAN. Thank you.

Senator GOLDWATER. I have only one question, Professor.

I understand that your report recommended that the FCC should repeal the prime time access rule as well as the financial interest and syndication rules.

Do you agree with the way the FCC has separated the prime time access rule from the other rules and would change only the financial interest and syndication rules?

Mr. KRATTENMAKER. Sir, Mr. Chairman, it is correct that we recommended the repeal of all three rules, the prime time access rule, the financial interest rule and the syndication rule. I certainly agree, as our report indicates in some detail, that the prime time access rule raises different policy issues than do the financial interest and syndication rules. So I certainly do agree that the Commission was correct in treating them in separate proceedings.

Senator GOLDWATER. But it should be repealed.

Mr. KRATTENMAKER. I do believe the prime time access rule does not serve the interests of the viewing public and should be repealed, but for reasons quite separate from those that I have advanced here this morning.

Senator GOLDWATER. Senator Wilson, do you have any questions?

Senator WILSON. No, Mr. Chairman. You asked the question that I was going to ask Professor Krattenmaker.

Senator GOLDWATER. Well, I thank you very much for taking off from a busy day at a very fine institution.

Mr. KRATTENMAKER. Thank you.

Senator GOLDWATER. The next panel will be Mr. Dean Burch, who was formerly Chairman of the FCC; Mr. Jack Valenti, president of the Motion Picture Association of America; Mr. Norman Lear, Embassy Communications and Tandem Productions; Mr. Len Hill of Beverly Hills, Calif.; and Ms. Mary Tyler Moore and Mr. Mel Blumenthal of MTM Productions, from Studio City, Calif.

You folks may sit in any order that you see fit, and I will repeat the same statement I made before. If you have prepared statements, they will be put in the record, and we would ask you to comment briefly upon what you have prepared.

The lights up here, if they confuse you, ignore them.

I guess Mr. Burch is first in line, so you may start off.

Mr. BURCH. We agreed among ourselves that Mr. Valenti would be the first witness.

Senator GOLDWATER. All right, Mr. Valenti.

STATEMENTS OF JACK VALENTI, PRESIDENT, MOTION PICTURE ASSOCIATION OF AMERICA; MARY TYLER MOORE, CHAIRMAN OF THE BOARD, MTM PRODUCTIONS; MEL BLUMENTHAL, EXECUTIVE VICE PRESIDENT; NORMAN LEAR, EMBASSY COMMUNICATIONS AND TANDEM PRODUCTIONS; LEONARD HILL, PARTNER IN HILL/MANDELKER FILMS; AND DEAN BURCH, COUNSEL, ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, AND FORMER CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION

Mr. VALENTI. Mr. Chairman, I am delighted to be here. I have some answers to some of the questions that were asked, particularly on the number of producers now producing television programs. Senator Packwood, I can speak to that with more than casual interest, and some of the other questions that were asked.

But in this controversy, there is just one issue, Mr. Chairman, and only one, and that issue is: Is it in the public interest to have a lively competition in the program television marketplace? That is the issue, and that is the question.

If you answer that question yes, then you must summon with all the energy that you have opposition to Chairman Fowler's tentative decision which he rammed through the FCC in August of 1983. The Mrs. Murphys of the world always live better where there is competition. It is a loss to Mrs. Murphy when there is monopoly, three-company monopoly in any market. I do not care which State it is in. That is the answer to Senator Pressler's question about Mrs. Murphy. What must be clearly understood here is that when Chairman Fowler and the networks clamor for deregulation, they are not advocating a free and open marketplace. They are not because the marketplace is not free, has never been free, and will never be free.

You have heard the four previous witnesses talking about there are only three networks, Mr. Chairman, and there will be in your lifetime and mine and your children's lifetime only three networks. That is because of a Government-ordered monopoly that took place

in the allocation of TV station licenses in 1947 and 1952. It is sealed in concrete forever that the marketplace is tilted. It is uneven, and it will always be that way.

Therefore, three networks, three companies hold dominating power over what does and does not go on television. If you, sir, want to put a program on national prime time television and you want to enter 100 percent of the markets, because that is what advertisers buy, you must go through one of three gateways. If you are turned down by the networks, you are stone, cold dead in the market. You have no alternative. You have no rebuttal. You have no other forum in which to present and contest this kind of vise-like power.

Even the President of the United States must go hat-in-hand to the networks when he wants to make a national address. That is why you do not see him making a national address on independent television stations, because they are only in 84 markets.

Therefore, other than public utilities, Mr. Chairman, which are regulated, I do not know of a single industry in which a three-company monopoly would be tolerated, not only by this Congress but by the people. If the people of this country really understood this issue, they would storm the corridors of Mr. Fowler's FCC to protest this decision.

That is why the FCC 13 years ago under the chairmanship of Dean Burch decided to curb the excess power of the networks. They did, and for the first time, competition was born. New companies came into being, that is, syndication companies and production companies. Senator Packwood, in the 1983–84 television season, 96 producers have shows on the networks, mini-series, specials, movies of the week series, far more than they had in 1970. At that time independent television stations were fiscally sick. There were only 78 of them in 34 markets—and they now became a true competitive enterprise. Now there are 179 independent television stations in 84 markets.

Why did that happen, Mr. Chairman? It happened because for the first time popular, off-network shows like "M*A*S*H" and the rest were made available to independent television stations. They were able to compete against the networks.

National advertisers rejoiced at all this robust competition. Why? Because they found out in their studies that advertising rates were 20 to 60 percent higher in those markets where there were no independent stations than there were in ones where there were one or more independent stations.

Mrs. Murphy is the one who pays for extra advertising costs. Those who pay for extra advertising costs that are passed along is that valiant, long-suffering, dumped-on body called the American public.

So when the networks and Chairman Fowler cry deregulate, what they mean is let's return to a three-network monopoly. When those who oppose the networks say "keep the rule as it is", we say "keep competition alive."

Unless that definition is clearly understood, the networks are going to continue to spread their disinformation, which in its soiling of the truth, I must confess, excels the best efforts of Soviet revisionist historians.

If you rupture the current rule, you will have three-network monopoly. If you keep the current rule, you will have competition.

That is the simple issue.

The networks claim that they are losing audience, that they are losing audiences to cable, and that free television is going to be taken over by pay cable. Those claims are not only false, they are imperiously and arrogantly false. The very latest Nielsen Reports, as of October 1983, show that there are only minor differences in 1982 and 1983 audience shares. In fact, network audience shares in prime time, Senator, went up on four evenings a week and only slightly down on three. That means that their audience share in prime time from Labor Day 1983 through October 1983 is 78 percent. My God, how much more do they want?

CBS's own research data shows that in 1990 the networks are going to have a larger audience in absolute numbers than they have today. I might add, the astonishing gall of the networks is nowhere more garishly exhibited, than when they claim that they must control programing in order to compete with the new media.

Mr. Chairman, the networks are the new media. Stranger bedfellows there never was than the rapturous embrace of CBS and HBO who are partners in a new movie studio called Tri-Star. So when CBS comes here on bended knee and tells this Congress that pay cable is going to reduce them to rubble, right outside the door they are locked in a joyous embrace with the most powerful force in pay cable, called HBO. In profits, in audience share, they reign healthily; they reign mightily. I am going to tell you this: To every professional in the business, their erstwhile enemy, pay cable, is in trouble with subscribers as well as in bed with CBS.

The networks have no allies in this fight, Mr. Chairman. They have no allies. I heard Chairman Fowler say in a benign way that the networks are going to be a new source of financing for producers. Now, you heard him say that.

Well, why is it, if they are riding to the rescue of independent producers, not one single independent producer wants to be in the embrace of these honorable gentlemen's fiscal arms? They do not want it. The producers do not want to become employees of the networks, or serfs in a feudal kingdom, Mr. Chairman. The production companies fear if the networks are granted power, they are going to be forced out of business. Syndicators stir uneasily because they know if the networks take over programing, they will take over syndication. Independent television stations have a nightmare of having to go hat-in-hand to their chief competitors for the very programs they need to exist. Advertisers know that once you let the networks retain control of this business, advertising rates are going to rise because they are going to ravage the audience of independent stations.

Minority groups like LULAC—and you will hear from them, the largest Hispanic group in this country—are bitter over the way they have been totally excluded from national prime time television. They know if the networks have total power that they are going to be totally invisible.

The question I want to ask this committee is: Is it not strange that these people stand alone? All of the people who have been talking to you from the Commerce Department and the Justice De-

partment, and Professor Krattenmaker, have econometric models that they create in their computers. These are wonderful instruments. They can do everything except give you one indispensable fact they cannot give you, and that is how people will behave.

Professor Krattenmaker has never dealt with a network. He does not understand the real untidy, unruly world of television. If he had, he would not be making these statements he made here today.

I will finish by asking you this question. Is it in the public interest that monopoly power be restored to three networks? Is it in the public interest that monopoly power exhaust all competition in the marketplace? Is it in the public interest that the networks have to make more profits and get larger audiences and more shares? Is that the public interest? Is it in the public interest for three men—and that is what they are—to control what 100 million Americans see every day from morning until late at night?

The Senate on October 27, 1983 voted 57 to 32 in the face of a network firestorm of opposition to establish a 6-months moratorium on the current Financial Interest and Syndication Rule. Now, that is a massive Senatorial decision, and the FCC ought to heed what the Senate has said. But I am afraid that the Chairman of the FCC's ears are closed to the Senate voices.

Mr. Chairman, nobody on the FCC was elected to anything by anybody. The issue of who controls television in America, put Lebanon and Grenada aside, is a public policy issue of the most profound importance to elected officials. That is why the Congress should decide the future, whether the future is fair or foul, whether or not you are going to have three networks controlling everything, whether you are going to have a lively competition, because I think the latter is more suitable to the people that you in the Congress have by oath sworn to serve.

Thank you.

[The statement follows:]

STATEMENT OF JACK VALENTI, PRESIDENT, MOTION PICTURE ASSOCIATION OF AMERICA

There is one issue in this controversy and ONLY one issue: It is this: Is it in the public interest for there to be a lively competitive television marketplace? That is the issue and that is the question.

If you answer that question Yes, it is in the public interest, then you must oppose with all the energy you can summon the "Tentative Decision" which FCC Chairman Fowler rammed through the FCC in August 1983. This "Tentative Decision" would unleash the networks to roam at will in TV programing depleting competition that now exists.

What must be clearly understood is that when Chairman Fowler and the networks clamour for "de-regulation" they are NOT advocating a free and competitive market. They are weaving a grand web of delusion because the marketplace is not free. There are only three networks and in your lifetime and mine there will be no more than three networks. Because of the allocation of TV station licenses by the FCC in 1947, and 1952, there was forever sealed in concrete a tilted, uneven market in which three networks hold dominating power over what does and does not go on national prime time TV. If you have a program and want to exhibit it on national prime time you MUST have the permission of one of the three networks. You have NO alternative, no rebuttal, no forum to contest this vise-like power. Even the President of the United States must go hat in hand to the three networks when he wants to make a national address to the nation. He has no alternative either. Other than public utilities—which are regulated—no other American industry tolerates a three-company monopoly where new entries are impossible.

That is why the FCC, 13 years ago, determined to put the market in balance by curbing this excess power. The FCC in 1970 said hence forward the networks could

not obtain financial interests in programs licensed from others and could not syndicate programs after they finished their network run.

For the first time competition was born in national TV. New production and syndication companies were created. Independent TV stations which in 1970 were fiscally sick and numbered only 73 in 34 markets (excluding religious and foreign language "specialty" stations), now took off as true competitive enterprises. They grew to 179 in number in 84 markets in 1982. Why? Because for the first time, with the networks' power choke hold slackened, popular off-network shows, like M*A*S*H, were made available to them. National advertisers rejoiced at this new robust competition for their studies revealed in those markets where there is no strong independent TV station advertising rates are 20 percent to 60 percent higher than in markets where there is a strong independent. And you know who pays for increased advertising rates: that valiant, long-suffering, dumped on body called the American public.

I have here appended to this statement a copy of a slick glossy brochure entitled "CBS Theatrical Films." It celebrates four, new, theatrical films to be released by CBS and distributed by Warner Bros. in the U.S. and Canada.

What is the relevance of this? It illustrates that program production markets are open to the networks and that the networks are free to compete and are competing with established firms in the film production industry.

It also serves to show that the program distribution market is competitive, because CBS was able to choose Warner Bros. from among a score or more qualified distributors that fiercely compete for the right to distribute feature films to theaters. It demonstrates the truth of the conclusion reached by the FCC's Network Inquiry Special Staff that the program production industry is open to competitors and is in fact competitive.

You will not find any such material promoting original programing by a new, national television network. To repeat, there are only three national television networks, thanks to the frequency allocations scheme imposed by the FCC 25 years ago which assures for the foreseeable future that CBS, ABC, and NBC will remain a three-network monopoly and that the national television network business will remain closed to any and all aspiring new entrants. This is why the Justice Department filed massive antitrust lawsuits against each of the three networks which resulted in consent decrees in 1977 and 1980, just three short years ago when each network promised to refrain from anticompetitive behavior—including the very same behavior prevented by the financial interest and syndication rule.

Until program producers can enter the national television network business with the same ease that the three networks can, and have, entered the program production business, the television marketplace cannot be called free and competitive.

Until there are more than three buyers for national prime-time television entertainment programming, the financial interest and syndication rule must remain in effect. Without this rule, three giant corporations, insulated from competition by government fiat and arrogant with the crushing power that they wield, will gain total control over both television program producers and independent television stations which provide the only semblance of competition faced by the three networks in today's marketplace.

Therefore when the networks and Chairman Fowler cry "deregulate" they really mean "let's return to a three-network monopoly." When those who oppose the networks ask the Congress and the FCC to keep the current rule intact they are saying "Keep competition alive."

Unless that definition of the market is clearly understood the networks will continue to spread their disinformation which in its soiling of the facts excels the best efforts of Soviet revisionist historians.

Rupture the current rule and you have three-network monopoly. Keep the current rule and you keep competition. That is the reality not the illusion.

The networks claim they are losing audiences to cable and soon free television will be taken over by pay cable.

This is not only not true, it is imperiously false.

The very latest Nielsen Reports as of October 1983 reveal that there are only minor differences between 1982 and 1983 network audience shares. In fact, network shares have gone up on four evenings a week and slightly down on three evenings for a total audience share of 78 percent.

THE CABLE THREAT TO NETWORK PROFITS IS MORE FICTION THAN REALITY

Marcella Rosen, senior vice president and media director of N W Ayer Inc., one of the world's largest advertising agencies, on October 24, 1983 predicted that network

audiences will begin to rise in 1984. She said that pay cable seems to be "running out of steam," and acknowledged the basic truth of the TV marketplace, "People do keep coming back to the networks for the vast majority of their viewing."

Pay cable, that sinister force which the networks say will bring an end to "free" TV unless they are unbridled, is indeed showing signs of trouble. Ms. Rosen reports between one million and 1.5 million homes disconnect pay cable each month. HBO, by far the largest cable network, reports that it loses 4 percent of its subscribers each month to subscriber defection, or churn. Perhaps because of this, HBO has told the creative community that it has over-bought made-for-pay TV programs and has instituted a buying freeze on original movies and series.

NBC Entertainment President Brandon Tartikoff recently told reporters that "ratings on cable are not significant enough yet to make us reconsider programming decisions." In fact, he mentioned a study which showed "Hill Street Blues" receives higher ratings in pay cable households than in noncabled households. NBC Chairman Grant Tinker has said that audience fragmentation from cable is "more a function of our not doing our jobs as well as we can do them" and that "NBC would like to get some of that audience back with some of the programming we present."

CBS's own research data forecast only a 12 percent audience share for cable in 1990 whie they predict that network audiences will be larger in absolute numbers than they are today!

One of the best ways to test whether cable in fact poses a threat to the networks is to examine the Tulsa, Oklahoma market. One network executive has stated that this market reveals a picture of impending doom to "free" network television.

Arbitron Ratings 1982 County Coverage, demonstrates that the networks continue to dominate television viewing, even in Tulsa where 48 percent of the television households are cable subscribers. When both cable and non-cable households are considered, the three Tulsa network affiliated stations capture 77 percent of ALL television viewing during the total day, and 78 percent of prime time viewing. The remaining viewing is split up among two local independent stations and one public broadcasting station, as well as five distant stations imported by the cable system, four cable networks and three pay cable services. These figures show that even in highly cabled markets like Tulsa, the three national networks dominate television viewing. How can thirty or so cable advertiser-supported and pay networks be considered a threat to the networks when all of the cable channels combined cannot muster a percentage of the viewing audience equal to that enjoyed by just one of the national networks?

To be sure, the cable gnats are annoying to the network elephants. But no reasonable person should be asked to believe that they pose a mortal threat to the three networks which operate with ultimate security under the monopoly of the airwaves which the FCC has given them.

Cable competition is merely a straw man the networks are using as an excuse to grab total control over television programming and thereby control the real network competition—independent television stations.

NETWORKS DO NOT ASSUME THE RISK OF PROGRAM PRODUCTION

The networks very seldom pay a license fee that recoups production investment by independent producers. Moreover, the networks make money even on dead pilots! Pilots which the networks turn down as series are aired on the network one, two times and advertising revenues return the license fee—and more—so that with material the networks disown they retrieve their investment and make money. But not the producer. He is stuck with deficit financing he cannot recoup.

The networks' "risk argument" is barren of reality and they know it. Moreover, if the networks want to take a financial interest in programs they air, the producers would be pleased to trade them financial interest for an equal share of advertising revenues. You may wager safely the networks would sooner fling themselves off CBS' Black Rock than give up one dollar of advertising revenue yet they implore the FCC to give them from producers what they themselves are inflexibly resolved never to give to producers.

Moreover the Tentative Decision would replace the proven effective and totally self-executing existing regulation with rules that would require the Commission to make subjective judgments as to the propriety of each and every syndication agreement entered into by the networks. The Tentative Decision would acutally increase government intrusion in the marketplace, not decrease it as deregulation is supposed to do. However, the Tentative Decision has an even more fatal defect than administrative complexity.

By eliminating all vestiges of the financial interest rule, the Commission has removed the essential component necessary to give meaning to competition in the syndication market.

Because the networks would be allowed to obtain a financial interest in programs they license, including a controlling interest, they could control syndication through their selection of "independent" syndicators. The networks would choose syndicators with the expectation that the syndicator's decisions will be "congenial" to the long-term range interests of the network. Of that you can be sure. Moreover, as the Justice Department testified on March 14, 1983 before the FCC the anti-trust laws are powerless to police such "arrangements."

The astonishing gall of the networks is nowhere more garishly displaced than in their claims they must control programming to compete with the so-called "new media." Not tomorrow, not 1990, but right now, the networks are up to their eyeballs in investments in new technology. They are the new technology.

Stranger bedfellows there never were than the rapturous embrace of CBS and HBO who are partners in a new movie studio, Tri-Star. When CBS, on bended knee, tells this Congress how pay cable is going to reduce them to rubble, just outside your door they are cuddled up joyously in movie production with the most powerful force in pay cable, HBO.

Are the networks so hurting financially to cause the FCC to stand by fecklessly while a three-network monopoly in television is allowed to be reestablished?

Network profits have soared 550 percent since 1970, far beyond the rate of inflation.

CBS just reported its third quarter 1983 earnings. Net income more than doubled over the same period last year. Earnings per share rose 24 percent.

RCA reported its 1983 third quarter earnings increased 34 percent over the comparable period last year. Said Grant Tinker, NBC chairman in Broadcasting magazine, "NBC's health is much, much better this year than last year." No wonder. NBC's third quarter profits rose sharply on a 16 percent gain in revenues.

In profits, in audience share, the networks reign healthily, mightily, in supreme command of national prime time TV. Their erstwhile enemy, pay cable, is both in touble and in bed with CBS. All the networks are pouring money and expertise into the new technology.

Finally, the networks claim that they would become a new supplier of capital for producers and thereby increase sources of financing for programming.

The FCC swallowed whole this indigestible parody of what is true and real. If the networks are riding to the rescue of independent producers why is it that no independent producer wants any part of these honorable gentlemen's financial embrace?

The networks have no allies in this debate, except some of their affiliates.

The producers don't want to become network employees, serfs in a network feudal kingdom.

Production companies fear they will, in a three-network monopoly, be forced out of business.

Syndicators stir uneasily for they know if the networks control the programs, they will also control syndication.

Independent TV stations recoil from the nightmare of having to go, beggar's cup in hand, to their giant competitors, the three networks, for the very programs they need to survive.

National advertisers have large concerns that advertising rates will rise once the networks bestride the total marketplace with power to ravage the audiences of the independent stations.

Minority groups, like LULAC, the largest Hispanic organization in the United States, are bitter over the networks' exclusion of Hispanics from national TV and they know if the networks possess total power the Hispanics will become totally invisible on national TV.

Is it not strange that the networks stand alone in this long, tormenting and useless controversy? It is a useless controversy because no one has yet answered the indispensable first question: "What is there in the public interest that compels a change in this rule?"

Then, why, oh why, are we here?

No one who understands the unruly and untidy world of television wants a change or believes one is needed.

Is it in the public interest that monopoly power once again exhaust the market of all competition?

Is it in the public interest for networks to become more powerful and more profitable?

Is it in the public interest for the future of independent TV stations to be put to hazard?

Is it in the public interest for three men to absolutely control and decide what 100 million Americans see on TV from early morning to late at night?

The Senate of the United States in a floor debate last Thursday voted 57–32, in the face of a network firestorm, to put a six-month moratorium on any FCC action. This is a massive and unambigious senatorial decision that the FCC ought to heed, but the FCC Chairman's ears are closed to the Senate's voice. No one on the FCC was elected to anything by anybody. The issue of who controls the American TV programming market is a public policy issue of the most profound importance to elected officials.

That is why the Congress should decide whether the future is fair or foul, whether a three-network monopoly or lively competition is more suitable to the interest of the people this Congress has, by oath, sworn to serve.

As a necessary first step, the Congress should pass S. 1707 now to stop the FCC from carrying out its misguided mission of "deregulation" which in reality, as this document has tried to explain, restores three-network monopoly to a market which is now spiritedly competitive.

[The following information was subsequently received for the record:]

QUESTIONS OF SENATOR GOLDWATER AND THE ANSWERS THERETO

Question 1. It is claimed that proponents of the rules have abandoned arguments about diversity of programs, increased competition and creative independence and have invented a substitute ground that the FCC rules "might prevent some future harm that conceivably might occur" to independent stations. Have you abandoned each of these earlier concerns?

Answer. We have neither abandoned the earlier concerns nor invented a new one. In 1970 the Federal Communications Commission adopted the Financial Interest and Syndication Rule based upon convincing evidence that

(a) networks became the only buyers of prime time programming after they prevented advertisers from purchasing entire programs and first-run syndication evaporated in the early 1960s,

(b) networks used their oligopsonistic positions to extract valuable concessions from program producers, including profit shares and rights to syndicate off-network programs,

(c) networks favored the programs in which they had a financial interest over those in which they did not,

(d) program producers, unable to bargain for sufficient licensing fees and under pressure to grant syndication rights and other financial interests to the networks, were unable to maintain financial stability,

(e) networks used their marketplace power to attain control over programs from inception to broadcast, including creative control,

(f) independent syndicators found it very difficult to compete with the networks, and

(g) networks had a conflict of interest in selling syndicated programs in markets containing independent stations which were in competition with network affiliates. See Report and Order, 23 FCC 2d 382 at 387, 389, 392–94 (1970).

The foregoing factors stifled the diversity in broadcasting that the Commission has historically supported. Diversity has been defined and measured in several ways. The term broadly describes "the goal of increasing the number and types of programs produced by different suppliers and offered to viewers through a variety of outlets." Network Inquiry Final Report at 460. This definition, although not exhaustive, embodies the elements of (1) types of programs, (2) sources of programs, and (3) outlets accessible to viewers. Importantly the Commission's primary concerns in adopting the Rule were sources of programs and available outlets.

Growth in the number and strength of independent television stations is discussed with frequency because it constitutes a tangible, quantifiable way in which diversity has been enhanced by the Rule.

For example, in 1972, there were 73 independent television stations serving 38 TV markets. By 1982, these numbers had increased to 179 independent television stations serving 86 TV markets. In is noteworthy that in the same time frame that independent television stations have undergone a dramatic change in their profits and losses. In 1971, they suffered a loss of $24 million. By 1980, they had a profit of $159 million.

The Association of Independent Television Stations (INTV) credits the Rule with much of this progress. In their judgment, because the networks cannot control off-network syndication, independent television stations have attracted numerous viewers and advertisers. This has created additional viewing options for the people.

It is important to remember that the competitive viability of independent television stations is a relatively new phenomenon. Since 1970, independent television stations have increased their share of the television audience in all dayparts while network affiliates have lost audience share. This has led to independents nearly doubling their share of national and local spot television revenue, from 12.7 percent of the total in 1970 to an estimated 23.2 percent of the total in 1982. Also, independents have performed dramatically better than affiliates and networks (including network owned and operated stations) in increasing pre-tax profits since the adoption of the Rule and in the number of stations showing a profit. What this means is that the Rule has allowed independent television stations to compete with networks affiliated television stations and network for advertising revenues and have permitted them to become viable alternative viewing options.

The Rule also has encouraged a diversity of program sources, distributors, and types of television programs. The greater number of substantial independent producers which has emerged since the adoption of the Rule enhances diversity among program sources.

I say this for two reasons:

First, producers and syndicators have been able to make and distribute onetime and mini-series programs outside the network milieu.

Second, when making programs for the networks, producers are better able to withstand "networks(') . . . control (of) the creative process" in television entertainment programming. Report and Order at 391. Such control "tends to work against the diversity of approach which would result from a more independent position of producers. . . ." Id. at 394.

Prior to the Rule, when producers were in a less secure financial and creative position, networks were single-minded about conforming programs to what they believed advertisers and viewers would find acceptable. See Report and Order at 391-92. Today producers are better able to stand firm regarding creative freedom, but this is only due to the Rule.

Television audiences get more viewpoints when the number of producers is increased. All situation comedies may have similar themes, but there clearly are distinguishing factors in the programs such as portrayals of varied social and ethnic backgrounds. For example, "All in the Family" overcame a network taboo in depicting a white bigot, while "Rhoda," "Chico and the Man" and "The Jeffersons" depict ethnic groups. Each of these programs differed from the other, and as a group they differed from earlier situation comedies which tended to portray a stereotypical surburban middle class.

The point is that the Rule permits creativity in program and this is the lifeblood of the industry.

Question 2. Mr. Valenti, you represent several very large corporations. Is this a battle between the studio giants and the network giants for a piece of the syndication profits?

Answer. This issue is far from being a battle between giants. Producers of all sizes support retention of the Rule.[1] Groups such as the Producers Guild of America, Charles Fries Productions, Hill/Mandelker Films, D. L. Taffner, Ltd., Mandelu Enterprises, Inc.—the type of small producers the networks claim they want to assist—do not want to "risk share" with the networks. They prefer dealing with independent studios, major independents, syndicators, and other outside financial sources rather than becoming "captives" of a network.

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[1] Alan Enterprises, Inc.; Allwhit, Inc.; Bud Austin Productions, Inc.; Phillip Barry Productions; Barry & Enright Productions, et al.; Carsey-Werner Co.; Center for Non-Broadcast Television; Centro de Comunicacion Oblato; The Dick Clark Co., Inc.; Compass Productions, Inc.; Comworld Productions; Columbia Pictures Industries, et al.; E. C. Productions, Inc.; Embassy Communications and Tandem Productions, Inc.; Flipper Animatin Filmmakers Corp.; Fremantle International; Samuel Goldwyn Co.; Goodson-Todman Productions; Hill/Mandelker Films; Hispanic Telecommunications Network; Alan Landsburg Productions; Bruce Lansbury Productions, Inc.; Lila Productions; Lorimar Productions; Mandelu Enterprises, Inc.; MCA, Inc.; MGM/UA Entertainment Co.; MTM Enterprises, Inc.; Motion Picture Association of America; New Citizen Productions; David Paradine Televison, Inc.; Paramount Pictures Corp.; Penthouse Presentation, Inc.; Polygram TV; Public Media Center; Rattlesnake Productions, Inc.; Roach Studios, Inc.; Rohrs Taffner, Ltd.; Viacom Productions, Inc.; Walt Disney Production, Inc.; Warner Communications, Inc.; Washington Area Film and Video League; Worldvision Enterprises, Inc.; Jose Luis Sedano (Mestizo Production Associates).

The list of advertisers, children's guilds and labor organizations, television stations, public interest groups, religious organizations and syndicators, who support retention of the Rule, number in the hundreds. Many of these groups, such as the 41 members of the Committee Against Network Monopoly have no financial stake in this issue. Their concern is that increased network concentration of power will reduce the quality and diversity of programming available to the public. New independent television stations and small syndicators, on the other hand, believe that repeal of the rule threatens their very existence.

Question 3. Your companies have a lot of popular shows on each network. Does that give them bargaining clout to refuse network requests for financial interest or syndication rights?

Answer. Major studios certainly have more clout than small producers with no production history, but I want to stress that all producers face the same problem when negotiating with the networks. A new television program that a producer creates has no guarantee of success. Even the best producers have flops. It is extremely difficult to predict which programs will become popular and which will never acquire audience interest and support.

In the world of television, producers cannot threaten to take their program to a myraid of other buyers. There are only three buyers and they have absolute power over national prime time television. There are no alternatives, no other entry points to national prime time television. These are the three networks—ABC, CBS, and NBC.

So what we are talking about in the real world is what Tarzan said to Jane: "There is a jungle out there!" The networks have the clout at the bargaining table today, and unless the Rule is preserved even the strongest and best financed producers will not be able to withstand the networks demands for financial interest or syndication rights.

Senator GOLDWATER. Thank you very much, Mr. Valenti.

The red light does not have any more effect on you than Lyndon Johnson.

Ms. Moore, it is a pleasure to welcome you here.

Ms. MOORE. Thank you very much.

Senator GOLDWATER. You have done a lot for a lot of us.

Ms. MOORE. Thank you.

Mr. Chairman, members of the subcommittee, I am here today in my capacity as Chairperson of the Board of MTM Enterprises, Inc., a television production company that has grown and thrived under the financial interest and syndication rules. But of more importance, I am here today as a representative of thousands of men and women, writers, directors, performers, producers, who work together to create television programs.

We support S. 1707 because we believe it is the guarantor of quality and innovation in television programing. We support S. 1707 because it is the only way to preserve rules which enable talented men and women to break into industry and create their own production entities. And we support S. 1707 because we do not believe that three giant corporations, the networks, should totally dominate the television production industry, stifling creativity and diversity while threatening the growth of independent television sectors.

Mr. Chairman, the entire creative community, a community which prides itself on independence, is united in the effort to maintain these rules. In an industry of individualists and mavericks, such unity is unprecedented. We believe these rules encourage creativity, and creativity is the key to greater quality in television. The rules provide the necessary incentives so that creators of unique and popular television programs are encouraged to continue their work.

There is absolutely no reason why those who create programs must be forced by the networks to relinquish their ownership rights and their ability to market and profit from their creations after the network run in order just to get into the network theater.

But this is what happened to me, Norman Lear and to many others in the independent production business before the FCC promulgated the rules they now wish to repeal. Domestic and foreign distribution rights to the Mary Tyler Moore Show—that was the first creative venture of MTM—were taken, not purchased, by CBS when the program was first developed in 1969. Norman Lear was required to do the same thing when he created "All in the Family" just prior to the rules.

It was not until we were able to retain our financial independence after the creation of the financial interest and syndication rules that our companies became viable enterprises, accumulating assets and resources which allowed us to grow and have the ability to produce such shows as "Hill Street Blues," "St. Elsewhere," and the new "Bay City Blues."

This is the competitive free market system at work. I can assure you, Mr. Chairman, that without these rules, MTM Enterprises and many other companies would not be around to argue for adoption of Senator Wilson's bill.

But more than the economic security of independent producers is at stake as you consider the implication of the FCC's tentative rules. The struggle that we have been waging for the past decade to find and develop quality programs that feature women and minorities in positive and realistic roles will also be called into question if the rules are repealed.

Whenever such efforts succeed, it is through the work of independent producers. Roles of women both in front of and behind the camera should be, must be encouraged. I have been heartened over the last decade by the number of women entering the television production business. But I want to underscore this, that in the history of television, there have not been and there are not now any women holding positions of significant power at the networks who are involved in the inner sanctum of network decisionmaking.

You only have to listen to Dan Travanti, star of "Hill Street Blues," who played John Walsh in the TV movie "Adam," to learn of the struggles of independent producer Linda Otto. She created the movie to tell the true story of Adam Walsh. Dan has told many of your colleagues that "Adam" would never have been created if they had been working for the network, and he would tell you how Linda had to fight the networks to do true justice to Adam Walsh's story.

Linda Otto is just one example. There are now over 90 women producers bringing their individual perspectives to television production. Repeal of these rules will discourage this healthy trend. The rules have created an atmosphere much more conducive to providing outlets for talented women and minorities who want television to reflect more of life as it truly is.

The real issue for this committee, Mr. Chairman, is how best to assure that American families, the Murphys, have access to quality television programs which enable us to be educated and enter-

tained in good taste. I submit that only with a truly independent television production industry can we hope to achieve such a goal.

This is not the time to encourage more mediocrity in television. After more than a decade of experience under the rules, we know that the viewing public can have the best that our talented, creative community can offer. Only through support of the Wilson bill can Congress guarantee that there will be more "M*A*S*Hes," more "Hill Street Blues," more "Fames," more "White Shadows," more "Archie Bunkers," "Lou Grants," "Maudes," "Alices," "Rhodas," and "Bob Newharts." These are only some of the types of shows and the famous characters which will be threatened by repeal of these rules.

Thank you.

Senator GOLDWATER. Thank you very much.

Mr. Blumenthal?

Mr. BLUMENTHAL. Thank you, Mr. Chairman, members of the committee. I am the executive vice president and one of three principal shareholders of MTM Enterprises, Inc.

MTM urges your support of S. 1707, a bill which in our view will encourage continued creativity and diversity in television programming.

The period of the existence of the syndication and financial interest rules directly coincides with the period of growth and prosperity of MTM as an independent production entity. MTM is an important example of how a wide variety of high-quality television programing does result from the combination of efforts from unique creative talent, sound business management which functions interdependently with creative talent, profit motivation through ownership and a degree of control over the creative process and the resulting product, and a regulatory atmosphere which has given MTM a fighting chance in dealing with the networks.

The financial interest and syndication rule play a vital role in encouraging creative integrity of our programs. "Hill Street Blues" would not be on the air today but for MTM's investment in production well in excess of $65,000 per episode above and beyond that which the network pays it. At the end of last season, which was the third season of the series, we had produced 60 episodes of the series at a cumulative deficit in excess of $3 million. Upon completion of production of 100 episodes, which is necessary for us to achieve in order to have a viable syndication package, and assuming the network gives us the opportunity to reach that point, we will have accumulated a total deficit substantially in excess of $6 million.

On the other hand, NBC makes a substantial profit on "Hill Street Blues" each and every week. With respect to just last season's episodes of "Hill Street Blues" on NBC alone, NBC generated a profit in excess of $20 million.

After filming the first episode of "St. Elsewhere," which premiered on NBC last season, MTM realized that the initial episode did not successfully meet its full creative expectations, and, therefore, substantial portions of the first episode were reshot. NBC was unwilling to pay for this reshooting, and because MTM firmly believed that these changes were essential to the success of the series, MTM undertook these changes at its own expense.

Thus, after producing one episode of "St. Elsewhere," MTM had incurred additional costs substantially in excess of $1 million and has since incurred further substantial episodic deficits, with the only hope of recoupment being that the series will become successful and remain on the air for at least 5 years, thereby allowing MTM the opportunity to sell the show in syndication.

The record that was set by "St. Elsewhere" last season has now been shattered by a new series which premiered last week entitled "Bay City Blues." This new series which focuses on a group of people involved in minor league baseball, was created, developed, and produced by the same creative team that created and produces "Hill Street Blues." To the best of my knowledge, this new series will be the most expensive series produced for television. Although NBC did in fact agree to pay a very fair license fee when compared to license fees generally, their license fee does not come anywhere near covering the costs of production.

MTM will deficit finance in excess of $100,000 for each episode of this series. MTM has undertaken this substantial risk in order to give the television audience a show which is both innovative and entertaining. If our judgment is correct and the audience responds favorably to this new series for at least 5 years, hopefully MTM will be able to recoup its investment and profits from resale and syndication.

The "Hill Street Blues," "St. Elsewhere," and new "Bay City Blues" experience demonstrates MTM's philosophy and belief that the American audience deserves quality programing, and MTM is willing to invest its capital to bring such programing to the network. Without the ability to recover its investment and make a reasonable profit, there would be no motivation for MTM or any other production company to create and produce unique, expensive, and high-quality series such as "Hill Street Blues," "St. Elsewhere," and "Bay City Blues."

The long term upside potential now available in television is due to the rule and has afford MTM the ability to attract, support and retain the high quality creative personnel needed to create and produce its shows and to have the resources available to develop and support new writers, producers, directors, and new innovative programs.

I would like to make it absolutely clear that the so-called FCC compromise proposal is no compromise at all. First, it is pure fallacy to allege that the networks will negotiate for or purchase financial interests in MTMs programs. The networks will have the power to extract the maximum permissible rights as the price of getting your program on the air. If anyone believes otherwise, he is living in an "Alice in Wonderland" fantasy world, and he also does not remember the networks' negotiating tactics prior to the inception of the rules.

Second, repeal of the financial interest rule will rob production companies and their creatiave staffs of their incentive to invest the time, effort and money required to produce expensive, high quality programing. The viewing public benefits when MTM is willing to reshoot "St. Elsewhere" in order to improve the quality of the series.

Third, based on MTM's experience, to allow networks any involvement in the financial interest or syndication of our programs will encourage intolerable network interference in creative development and the production process.

Finally, reversion to pre-1970 days where three networks totally dominate all phases of the television industry is anticompetitive.

In conclusion, MTM is convinced that the degree of independence and the system of checks and balances that now exist between the networks and producers under the rule is vital to our continual effort to improve the quality of television programing. Eroding the measure of independence which now exists under the rules can only discourage the retention of experienced and established creative talent as well as the entry of new production companies, new creative talent, and further homogenize the resulting programing.

MTM urges your support of S. 1707 so that we can continue to produce programing such as the "Mary Tyler Moore Show," "Rhoda," "Lou Grant," "WKRP in Cincinnati," the "White Shadow," "Newhart," "Remington Steele," "St. Elsewhere," "Bay City Blues," "Hill Street Blues."

Thank you.

[The statement follows:]

STATEMENT OF MEL BLUMENTHAL, EXECUTIVE VICE PRESIDENT, MTM ENTERPRISES, INC.

Mr. Chairman, members of the Subcommittee, I am the Executive Vice President and one of three principal shareholders of MTM Enterprises, Inc., which is a privately owned independent television production company.

MTM strongly urges Congress to enact S. 1707 which would place a five-year moratorium on the repeal or alteration of the financial interest, syndication, and prime time access rules so that independent production companies like MTM can survive and thrive, and new production companies can be born to provide the networks and the American public with high-quality and diverse programming.

The period of the existence of the Syndication and Financial Interest Rules directly coincides with the period of growth and prosperity of MTM as an independent production entity supplying prime time television programs to the networks. Because of this fact, MTM may be considered an important example of how a wide variety of high quality television programming does result from the combination of the efforts of (1) unique creative talents; (2) sound business management which function interdependently with the creative talent; (3) profit motivation through ownership and a degree of control over the creative process and the resulting product; (4) and a regulatory atmosphere which has given MTM a "fighting chance" in dealing with the networks.

Some of MTM's program have been successful and profitable and some have been unsuccessful and have cost MTM enormous sums of money which have never been recouped. MTM's successful programs have varied widely from "The Mary Tyler Moore Show" and "The Bob Newhart Show," to "Rhoda," and "Lou Grant" which evolved out of the original "Mary Tyler Moore Show;" "WKRP in Cincinnati," a half-hour comedy set in a radio station which provided comedy with a social message; "The White Shadow," a one-hour drama about an inner-city high school and its white basketball coach, who must deal with the problems of minority teenagers, their parents, teachers and others in the community; "Hill Street Blues," a totally unique undertaking which came on the air to an initially passive response from the mass audience while at the same time earning twenty-nine Emmys, the George Foster Peabody Award, The Humanitas Award, and numerous other awards; "St. Elsewhere," another unique one-hour drama set in an inner-city hospital in Boston; and our most recent show, "Bay City Blues," about a minor league baseball team, which has just begun its first season.

As you may know, MTM's first program was "The Mary Tyler Show." It was developed in 1969 for CBS. If the rules had not been enacted in 1970, it is quite probable that MTM would have been a one-show company. There would have been no incentive to continue in the television production business.

Some brief background regarding our negotiations with CBS for "The Mary Tyler Moore Show" is revealing. As an express non-negotiable condition of getting our show on the network, CBS demanded and obtained 100 percent of all distribution and syndication rights in perpetuity and throughout the world as well as all subsidiary and merchandising rights to the series.

MTM is frequently asked whether now, with our established track record, the networks could still secure most or all of the syndication rights from MTM absent the rules. MTM's answer is absolutely and unequivocally yes. Negotiations would resemble those MTM encountered in getting "The Mary Tyler Moore Show" accepted by CBS. At the point in time when syndication and financial interest rights are negotiated, the producer is at its most vulnerable. For a show to acquire any value, it must be accepted by a network. We must get into the network theatre. Even though MTM may have had numerous prior hits, any new show which we submit to a network has no guarantee of success. Networks will simply demand significant rights as the price of getting the show on the air. They hold all the cards.

It is vital for members of this Subcommittee to realize that, at present and for the foreseeable future, there have been and will continue to be only three viable theatres (ABC, CBS and NBC) for the type of entertainment programming produced by MTM. With their enormous mass audience, these three networks generate billions of dollars of advertising revenue each year which support a large portion of the enormous production costs of this type of programming and which still provides very healthy profits for the networks. Because there are so many program suppliers all competing to get into the same three theatres (ABC, CBS and NBC), these networks have acquired enormous power and control over the production community. The networks have historically exercised this power and control to the fullest extent allowed under the applicable rules in effect at any particular point in time. Since the founding of MTM, the Syndication and Financial Interest Rules and the recent Network consent Decrees have operated to create a delicate balance to the unrestricted power and control of the networks in the negotiation process between the networks and program suppliers.

Since the inception of the Financial Interest and Syndication Rules, MTM has produced several series which it has put into syndication such as "The Bob Newhart Show," "Rhoda," "The White Shadow," "WKRP in Cincinnati," "Lou Grant," and several movies for television. MTM has had the freedom with respect to these programs to choose its own distributor and to maintain a voice and decision making authority over all aspects of the selling and distribution process. The revenues derived from the syndication of these shows have been used to help offset the deficits incurred in production of these shows and others which have not been successful enough to reach the syndication market. The profits which remain are used to carry the substantial current deficits of series such as "Hill Street Blues," "St. Elsewhere," "Remington Steele," "Newhart," and "Bay City Blues," and to fund the hiring of established writers and producers under long term contracts to develop new programming and to employ and support relatively new and unknown writers so that they may learn and develop their craft in order that they may ultimately develop and produce new programming.

All of this is not to say that every MTM show has been commercially and/or financially successful. MTM has produced several series on which it is unable to make syndicated sales.

When "Hill Street Blues" was first produced by MTM, it was recognized as one of the most unique television series in recent years. The large ensemble cast and multiple-story lines, complex photographic and sound effects gave the series a realistic look and feel. It also made "Hill Street Blues" unique and quite expensive to produce.

MTM was willing to risk a substantial amount of its own capital to produce "Hill Street Blues" because MTM believed it would become a successful show, and ultimately bring a return on its investment in the syndication market. The fact that "Hill Street Blues" became a critical and popular success, has given MTM further incentive to invest substantial sums of money in the series week after week in the hope that syndication revenue will provide a return on its investment as well as a reasonable profit.

Let me give you some actual figures concerning "Hill Street Blues" to dispell two myths the networks seem to be fostering.

The first myth is that the network pays the full cost of television production. The second myth is that networks, because they are restrained by the rules, are unable to share in the profits of a successful show. Both myths are untrue.

In the 1982/83 season, which was the third year of the series, it cost MTM approximateley $865,000 to produce each one-hour episode of "Hill Street Blues." Our li-

cense fee from NBC last season was $800,000, resulting in a $65,000 per episode deficit.

After producing 22 episodes of "Hill Street Blues," MTM had invested $1,437,000 that was not covered by the networks. The deficits incurred last season, when added to the deficits incurred during the first two seasons of the series, brings the total current deficit on this series after three seasons to approximately $3,230,000. MTM will need approximately 100 episodes of "Hill Street Blues" before it becomes a viable commodity in the syndication market. As of last season we had completed approximately 60 episodes. That means that at the current rate of deficit we will have accumulated a total deficit in excess of $6 million on the first 100 episodes of the series.

While producers must wait five to six years, if ever, to begin syndication sales in order to derive the hoped-for syndication profits, networks do not have to wait. During last season when NBC aired an episode of "Hill Street Blues" it charged an average of $125,000 for each of the 12 30-second commercials that appeared on the program. That means that the network grossed $1.5 million for the first run of each program, at a cost to them of $800,000. After deducting agency commissions and affiliate compensation, the network was left with a profit of approximately $250,000 per hour.

In addition, the network aired approximately 26 reruns of the series last season for which we were reimbursed by NBC only for the out-of-pocket guild and union residuals which totalled approximately $100,000 per episode. NBC's profit on these reruns was in excess of $550,000 per rerun, and a total in excess of $14 million for 26 reruns last season.

When added to NBC's profit on first-runs, their profit on "Hill Street Blues" for the 1982-83 season totalled in excess of $20 million.

As you can see, under the current rules the networks more than share in the success of their programs. For example, advertisers who wish to buy commercial time in hit series such as "Hill Street Blues" are required to buy commercials on less successful shows.

In addition, as shows attract more viewers, the networks increase their rates to advertisers to reflect the program's popularity. Also, even on pilots that do not go to series and on short-run series the networks sell commercial time, which recovers their development costs and in most cases also provides them with a profit on their investment. And on successful shows such as "Hill Street Blues," the network makes a killing, as indicated by the profit figures outlined above.

In my view, the Financial Interest and Syndication Rules play a vital role in encouraging the creative integrity of our programs. "St. Elsewhere, " which premiered on NBC last season had, until several months ago, set a record as the most expensive program in MTM's history in terms of initial startup costs. After filming the first episode, MTM realized that the initial episode did not successfully meet its full creative expectations. NBC was unwilling to pay for these changes, however, MTM firmly believed that these changes were essential to the success of the series, therefore MTM undertook these changes at its own expense. Thus after producing one spisode of "St. Elsewhere," MTM had incurred additional costs substantially in excess of $1,000,000 and has since incurred further substantial episodic deficits with the only hope of recoupment being that the series will become successful and remain on the air for at least five years, thereby allowing MTM the opportunity to sell the show in syndication.

The record that was set by "St. Elsewhere" last season has now been shattered by a new series which has premiered this season entitled "Bay City Blues." This new series, which focuses on a minor league baseball team, was created, developed and produced by the same creative team that created and produces "Hill Street Blues." To the best of my knowledge, this new series is the most expensive series produced for television. Although NBC did, in fact agree to pay a very fair license fee when compared to license fees generally, their license fee does not come anywhere near covering the costs of production. MTM will deficit finance in excess of $100,000 for each episode of this series. MTM has undertaken this substantial risk in order to stretch the quality of television programming to new heights and to give the television audience a show which is both innovative and entertaining. If our judgment is correct and the audience responds favorably to this new series for at least five years, hopefully MTM will be able to recoup its investment and profit from a sale in syndication.

The "St. Elsewhere" and the new "Bay City Blues" experience demonstrates MTM's philosophy and belief that the American audience deserves quality programming, and MTM is willing to invest its capital to bring such programming to the networks. Without the ability to recover its investment and make a reasonable

profit, there would be no motivation for MTM or any other production company to create and produce unique, expensive and high quality series such as "Hill Street Blues," "St. Elsewhere," and "Bay City Blues."

The long term upside potential now available in television is due to the rules and has afforded MTM the ability to attract, support and retain the high quality creative personnel needed to produce its shows and to have the resources available to develop and support new writers, producers, directors and new innovative programming. Without the Rules, much of the top creative talent in the industry will have no incentive to work in television—they will turn their attention to other forms of entertainment such as feature films and plays, all to the detriment of expanding high quality free television programming.

Historical evidence shows that neither the networks nor the program suppliers can predict with any certainty the reaction of the American public to a new television series. It is also important to note that only about 5% of the programming produced for the networks ever gets into syndication. However, it is MTM's belief and corporate philosophy that quality programming will ultimately survive and prosper and MTM is willing to invest its capital in support of this theory. Without the potential profits from syndication, companies like MTM are not likely to evolve in the future to support this belief in quality programming.

The networks already have multiple exlusive options on our series, exclusivity clauses, control of spin-offs, and other controls. The networks do not lose money on even their unsuccessful shows, while the independent production companies such as MTM bear substantial deficits on the same shows. Because of the pricing structure of network advertising time and the fact that the networks do not share advertising revenues with the program suppliers, the burden of a failed series is placed on the suppliers such as MTM. MTM is willing to assume that risk because the incentive for potential future profits encourages it and the creative personnel working with it to create new and diverse programming to obtain such profits. Please allow that incentive to remain.

The pay television industry has not created such changed circumstances as to justify modification of the rules. Although there is a lot of talk of original progamming for pay television, and, indeed, some limited amount of original programming has been produced, the amounts of money available from pay services are so far below what he networks will spend due to their enormous audiences which generate billions of dollars of advertising revenues per year that MTM cannot now, nor in the foreseeable future, contemplate production of high-quality expensive programming such as "St. Elsewhere," "Hill Street Blues," and "Bay City Blues" for pay television.

The Networks know that the real threat to their continued dominance for the foreseeable future are the independent stations and not pay television.

The Federal Comunications Commission is considering a new regulatory scheme which would repeal the financial interest rule and substantially modify the syndication rule. I would like to make it absolutely clear that from a creative standpoint the FCC's proposal is untenable.

First, it is pure fallacy to allege that the network will "negotiate" for a financial interest in MTM's programs. Because such terms are finalized before a network authorizes the writing of the first script for a new show, networks will simply extract the maximum permissible rights as the price of getting your program aired. Anyone who believes otherwise is living in an Alice in Wonderland world.

Second, permitting the networks to have ownership rights in our programs will rob production companies and their creative staffs of their incentive to invest the time, effort and money required to produce expensive high quality programming. The viewing public benefits when MTM is willing to reshoot "St. Elsewhere" in order to improve the quality of the series.

Third, the practical effect of any degree of network ownership in independent programs will be a reduction of the creative integrity of the ultimate product reaching viewers. The production industry spends inordinate amounts of time, energy and money producing shows because we believe in them. As creators, we are convinced that the degree of independence that exists between the networks and producers is vital to the quality of American programming. Based on MTM's experience, to allow networks any involvement in the financial interest in a program will encourage intolerable network interference in creative development.

It is important to remember that the networks already interfere in the creative production process. Permitting them to own even a small share of a program, however, will make them our financial "partners" with license to control decisions both financial and creative. Eroding the measure of independence the creative communi-

ty has to do its job can only homogenize the resulting programming and reduce the quality of the product that reaches viewers.

And finally, a return to the pre-1970 days where three entities totally dominate all phases of the television industry, is anticompetitive. As you are aware, the rules were promulgated to help ameliorate the networks' unfair bargaining advantage over producers. The three networks had the leverage to demand significant rights from producers, because without access to the network stage, a program could never attain value. The network potential to extract the maximum rights permissible still exists in a negotiation that now one would consider to be "arms length." Merely limiting the equity share for which the networks may "negotiate," does nothing to vitiate the fundamental imbalance of power that led to implementation of the rules in 1970. Networks still, in 1983, have the power of financial coercion over producers. The proposed FCC rules ignore that fact.

In conclusion, I feel very strongly that network financial interest in programming, regardless of the size of their participation, will stifle creativity in the television industry. In this regard, I would like to submit for the record my letter of August 2, 1983 to Congressman Thomas Tauke.

MTM is convinced that the degree of independence that exists between the networks and producers under the Rules is vital to the quality of American programming. Eroding the measure of independence the creative community has can only (1) discourage the retention of experience and established creative talent (2) discourage the entry of new creative talent and production companies, and (3) homogenize the resulting programming and reduce the quality of the product that reaches viewers.

MTM urges your support of S. 1707. Thank you for your consideration.

Senator GOLDWATER. Thank you very much, Mr. Blumenthal.

Mr. Lear.

Mr. LEAR. Mr. Chairman, I want to thank the committee for the opportunity to be here today and especially you, sir, for your interest and concern over the issue of financial interest and syndication.

The networks have tried to frame this issue solely as a battle between two wealthy special interests. They have taken out misleading advertisements talking about how the rule is anticompetitive and how it gives the independent, creative community a guaranteed control of the production of television entertainment. Anyone who has ever worked in television knows how untrue this is.

Unfortunately, a more important public issue is at question here, one I would like to address today, and that is the need to safeguard the diversity and the quality of what America sees and hears over the public airways because that diversity and quality is very much involved.

In America today, the primary instrument for mass communication is network television. While we all hear about the new technologies of cable, pay TV, direct broadcast satellite, the fact of the matter is that they represent doorways to just a fraction, just a fraction of the nearly 84 million TV households. Most Americans continue to get their entertainment and their information from the networks, from three nearly identical doors.

The FCC adopted the financial interest and syndication rules 13 years ago to promote diversity and competition in the television programing marketplace. Should they be repealed? Every marketplace of ideas should be unrestricted from the political, religious or moral dictates of the controlling group of the day.

How, then, do we feel about television, the largest and most impactful marketplace in the history of man which is totally controlled and restricted by yet another dictate, the commercial imperative of the day.

What America sees and hears of the public airways licensed to a network inevitably attempts to reflect the commercial imperative of that network rather than the visions of the many writers and other artists that are hired to produce those programs. That is inevitable. They are, after all, the licensees, and it is their business.

But to the extent that the present rules give strength to the independent production entity, there is at least an opportunity for some checks and balances because the independent production centers are the source of the writer, the author, that occasional unique and original voice who will challenge the commercial imperatives of the networks.

This has never been an equal battle. There are still, as I indicated, only three nearly identical doors that provide access to a potential 90 some percent of all viewers, and that is power. The only thing that militates against that power is the voice of the author, usually through some production entity, and attention is only paid that voice when it is strong.

To centralize more power and more control in the hands of the networks is to insure still more of a homogeneous, institutional and undiversified kind of television that so many complain about even now.

And assuming we agree that the quality of television is a matter of the public interest, let me ask you: How much do you think the quality of "M*A*S*H" would have suffered if the characters never went into the operating room, if the show had been absent the serio-comic flare for which it became so widely respected? Well, that is what the network wanted, and proof of that can be seen at the installation of "M*A*S*H" in the Smithsonian Institution. Every page of what the network wished changed is there, and they fought every extension of reality and every attempt to make the stories adult and mature, which is why "M*A*S*H" became perhaps the most respected television show in the history of television.

On "All in the Family," the network fought our doing stories on the subjects of homosexuality, of Watergate, Vietnam, the Jewish Defense League, dozens of other subjects, and they flatly refused to have us photograph "Archie Bunker" diapering his infant grandson. They were afraid of frontal nudity they said.

There were days devoted to this argument, hard to believe, but days devoted to the argument, and "Archie" finally diapered him and face up. The network had for a moment suggested that he diaper the baby face down. And surprise, surprise, there was no kneejerk reaction from the Bible belt, as the network promised there would be, and not one State seceded from the Union.

Then there is the "Mary Tyler Moore Show." When it was being prepared for production, the script called for Mary Richards to be a divorced woman. The network said no. Evidently there had been some CBS research, current at the time, which said that America did not want to see divorcees, Jews, or people with mustaches. That is quite true, and at that time one may go back and look at hundreds of hours of CBS television, and you will not find divorcees, Jewish characters and people with mustaches.

So Mary Richards had an 8-year run, never married, and it took another 3 years before the first divorced woman character made it to the air waves.

The proposed modification of the financial interest and syndication rule, which is no modification at all, it is a dead giveaway to the networks. Currently the networks exercise an enormous amount of control over the quality and the diversity of shows. If the rule is repealed, their power and control will be total. Because of that control, it takes a lot of doing for a unique or original voice to be heard in that vast, homogeneous chorus that is network programing today, because the name of the game for each network when they are deciding what ideas will make it on the network is how do I win Tuesday night at 8 o'clock, not, for example, how do I program with more attention to women, to minorities, to children, to the elderly.

Now, the networks say that if you remove the rules—and I heard it said again here today—they will be able to program more for the elderly, for women, for minorities. But they have through these years while the rules have been in place 2½ hours that each of those networks could have been programing for the elderly, for minorities, for women, et cetera, and they have never done so.

They also say that they will have the money then to be able to do these things—what money they seem to lack right now. And yet, they have been coming to the independent creative community for the implementation of program ideas. Had they wanted programs that dealt more with minorities, with women and others, do you think it is possible they would have come to the independent creative community and we would have said no, we who are in the business to get our shows on the air?

They have never come with those requests. Now suddenly it seems kind of perverse and suspicious that they would be coming and articulating that now.

I submit that when the most important criterion for selecting a show is how it may rate against the competition, the decision will often be made at the expense of taste and creativity, innovation, and a sense of responsibility to the public interest.

The choice of which show a network will put on the air is made in the context of this obsession. That is the commercial imperative. There are no villains here. It is not easy to program 22 hours a week—and these are mean and difficult jobs, and I respect many of the men and women in network programing. It is just that the writer coming to the network with a new concept is coming from another place, not that writers do not wish to score high in the ratings, too, but the writer's means to that end is the very best execution of his or her concept.

The networks will always, always seek to bend the concept and the teleplay and the casting and the editing to meet the needs of the marketplace as it perceives those needs at any given time.

Now, this battle is an honest one, and what I am most hopeful this committee will understand is the need for it to continue.

Viewers did prefer a more mature "M*A*S*H" with its seriocomic overtones. So diminish the effect and the strength of the independent writer-creater and the battle is over. It is in the public interest that that battle never be over.

I want to put this another way if I might take just another moment, Mr. Chairman, because I cannot say it strongly enough—and this is addressed to Senator Pressler's mythical Mrs. Murphy

and to Chairman Mark Fowler who said earlier he does not see how the quality of TV is involved here at all. If a network must in its opinion sacrifice quality and diversity for ratings, it will. That is its business. So will some writers, because we do have our hacks.

I am suggesting, however, that a writer's gut instinct is to believe that it is only the quality of his or her script that will insure the ratings. That is all the writer has to go on, and so that is always the way the writer begins. Whatever we write, good, bad or indifferent, and no one wishes to write a bad script, we are all writing for the smile of approval from the first person to read us. We are all writing for the respect of or peers. And we all begin by believing that any and all success will depend upon the quality of what we write and the observations we are able to make of the life around us.

That feeling is pure in the worst of writers, and it is the purity in the best of writers that affords us our finest moments in literature, films or television.

The place from which the networks come is also pure, but totally different. And so while there are writers who will compromise their scripts in any fashion to please the network, there are also writers who will not. They are the writers who have stood up to the networks time and time again to deliver from within independent companies virtually every one of the shows America has applauded most, I repeat, virtually every one of the shows America has applauded.

For tomorrow's innovator, that brilliant writer not on the scene, for him, for her, and for a viewing public that must not be denied the authorship of these fresh talents, I speak for all of them when I say that we must not centralize more power and control in network hands.

The bill before this committee, Mr. Chairman, provides a 5-year moratorium to study this matter further. We should take the time to do this. I do not agree with the NBC News president Reuven Frank's recent response to the question: Why was there no network news coverage of the debate over financial interests and syndication? His response was: I don't think the people give a damn. I don't think it's a major story or a matter of great public concern.

Well, if the debate over who determines the diversity and the quality of what a potential 84 million TV households may see and hear on network television every night is not newsworth, I submit, Mr. Chairman, I do not know what is.

Thank you.

[The statement follows:]

STATEMENT OF NORMAN LEAR, EMBASSY COMMUNICATIONS AND TANDEM PRODUCTIONS

INTRODUCTION

I want to thank the Committee for the opportunity to be here today and especially thank Senator Goldwater for his interest and concern over the issue of Financial Interest and Syndication.

This is an issue that has not been lacking for discussion for the last few weeks. There have been charges and countercharges. Many have tried to frame the discussion as a battle between two wealthy special interests. The networks have taken out misleading advertisements talking about how the rule is anti-competitive and gives the Hollywood studios a guaranteed control over the production of television entertainment. Anyone who has ever worked in television knows how untrue this is.

Unfortunately, a more important public issue is at question here, one I would like to address today. That is the need to safeguard the diversity of what America sees and hears over the public airwaves. I know that this Subcommittee has a deep concern for the need to protect those traditional American values of freedom of expression and the need to encourage diversity of discussion and views.

Today in America the primary instrument for mass communication is Network television. While we all hear about the new technologies of cable, pay TV and direct broadcast satellites, the fact of the matter is that there are still only three nearly identical doors through which Americans receive information about themselves and the world.

The question before this Committee is whether the FCC should return to the networks the right to negotiate for up to 100 percent of financial interest in a new show from an outside creator—and also be allowed to effectively control the distribution of that product for five and a half years after the network debut?

All right—let's talk network television—and the financial interest and syndication rules. Should the FCC return to the networks the right to negotiate for up to 100 percent of financial interest in a new show from an outside creator—and also be allowed to effectively control the distribution of that product for five and a half years after the network debut?

The FCC took those rights from them 11 years ago to promote diversity and competition in the television programming marketplace. Should they be returned? I had planned to talk some about people for the American Way, Because I am proud of it—and because I believe its work is so important to the preservation of a free society—but in a way these subjects are very much connected.

The Baltimore Sun gave Steve Knickmeyer an award today for a series of editorials, one or which confronted a group of extremists who attempted to control a particular marketplace of ideas, in his case the textbook. If a vote were taken now, I think this room would agree that every marketplace of ideas should be unrestricted by the political, religious, or moral dictates of the controlling group of the day. How then do we feel about another marketplace of ideas—television, the largest and most impactful marketplace in the history of man—which is utterly controlled and restricted by yet another dictate: The commercial imperative of the day?

Think about it. What America sees and hears over the public airways licensed to a network inevitably reflects the commercial imperative of that network—that corporation—rather than the visions of the many writers and other artists that are hired to produce those programs.

That is inevitable, I suppose; they are, after all, the licensees. It is their business. But to the extent that the financial interest and syndication rule provides some strength to the production entity, there is at least an opportunity for some checks and balances. Because the economically viable, independent production centers are the source of the writer, the author, that occasional unique and original voice who will fight against the commerical imperatives of the networks.

This has never been an equal battle—strangely enough, because there are more of us and so few of them. There are still only three nearly identical doors that provide access to a potential 90-some percent of all viewers—and that, friends, is power. The only thing that militates against that power is the voice of the author, through the production entity—and attention is only paid that voice when it is strong.

To centralize more power and control in the hands of the network—gratuitously, as a gift—is to ensure still more of a homogenous, institutional, and undiversified kind of televison that so many complain about even now. And, assuming that the quality of television is a matter of the public interest, let me ask you:

How much do you think the quality of MASH would have suffered if the characters never went into the operating room? If the show had been far less serious, and absent the serio-comic flair for which it became so widely cherished? That's what the network wanted. They fought every extension of reality, and every attempt to make the stories adult and mature until the success of the show proved them wrong. You can read the pilot script for MASH and follow the changes the network insisted on by visiting the MASH exhibit at the Smithsonian Institution. Larry Gelbart, the creator of MASH, one of those strong voices that provide a degree of check and balance, placed them there.

And if the Smithsonian Institution is interested, I would be happy to document some of what the network didn't want me to do with All in the Family in the exhibit that features Archie's and Edith's chairs. For example: They fought my doing stories on the subjects of homosexuality, Vietnam, the Jewish Defense League, impotence, dozens of others—and they flatly refused to have us photograph Archie Bunker diapering his infant grandson. Frontal nudity, they called it. When we refused to comply, a young network executive proposed a compromise. "How about

you cut just about here—so he's diapering below camera range?" We refused. "Well, then," he said, "how about Archie diapers him on his belly."

There were days devoted to this—but Archie did diaper him face up—and surprise, surprise, there was no knee-jerk reaction from the Bible Belt as the network promised there would be—and not one State seceded from the Union.

Then there's the Mary Tyler Moore show. When it was being prepared for production, Grant Tinker told me that the script called for Mary Richards to be a divorced woman. The network said no. There was some CBS research, current at the time, which said that America didn't want to see divorcees, Jews, and people with mustaches! So help me! Tinker lost that battle; Mary Richards had an eight year run, never married, and it took another three years before the first divorced woman character made it to the air waves. That show was One Day at a Time and I was there for that fight. Today, too, it goes on and on and on. So there is a question of the public interest here. And, yes, a money question, too.

A lead editorial in the New York Times last Saturday, discussed "the war for control of syndicated re-runs, between the television networks and the producers and movie studios that provide most of their programming"—and it made me furious. I don't know whether I was furious at the New York Times, which didn't understand the issue at all, or at those on our side of the argument for not having made our position understood. If, fifteen-some minutes from now, I see in your eyes that it is still not understood—well, how long has it been since you've seen a grown man cry?

Speaking of the proposed modification of the financial interest and syndication rule, which is no modification at all—it is a dead giveaway to the networks, the New York Times says: "If these changes will not significantly upset the industry, why have they aroused such passion? If the Rule doesn't matter much, why rock the boat? . . . . Because it probably does matter a little, and change might be for the good."

"Because it probably does matter a little . . ." What kind of condescending ——— is that? It doesn't matter a little, it matters a whole damn lot—and that is why it has aroused our passion!

The Times editorial refers to the network contention that competition from cable and groups of independent television stations has destroyed any justification for their exclusion from syndication revenues. First of all, the mention of cable as real competition to the networks is a red herring. To a large extent, the networks are the new media. They are deeply committed to cable, DBS, video discs, pre-recorded cassettes—and CBS has just formed a new major studio, Tri-Star, in association with its supposed arch-enemy, HBO—and Columbia Pictures. And deeply committed means deeply invested with dollars the networks now say they can't afford for quality programming.

So the mention of cable and/or new technologies is a scare tactic. But the newfound strength of independent television stations is another matter. They do, indeed, provide competition. And the big, big question here is—since increased competition is supposedly what deregulation's all about—even the networks feign a commitment to that—why then are they running to the FCC, seeking to kill their competitors? I'll tell you why: To protect their government-granted licenses, their 5 owned and operated stations from competition for the advertising dollar.

When the financial interest and syndication rule took effect, there were about 75 independent television stations serving 38 markets. Those 75 stations were struggling, losing at the rate of $24,000,000 a year. And why? Because they were unable to compete for advertising. Unable to compete because the networks had control of the off-network use of the programs. Today, there are 179 vigorous independent stations, serving 86 markets. They are competing for advertising revenue—and they are making profits of over $100,000,000. And they are doing that by running Barney Miller, Star Trek, MASH—all of the off-network product that compete with the network's first-run product—with which companies such as mine fashioned a syndication business. It is not hard to see what that means to the networks, but it is hard to see how grown men—there is only one woman in any position of real power at a network—can come crying to a government agency for help because they face a little honest competition.

And how disingenuous! In the next sentence of the Times editorial, it notes the network argument that if they can once again control syndication, it would help stimulate competition among smaller production companies. Did I say disingenuous? That is downright smarmy.

They cry "save me!" from their major competitors who fight them for advertising revenue in every TV marketplace in the Nation—by offering to stimulate competition among the small production companies in little old Hollywood—offering to provide "another source of up-front cash to be traded for future syndication revenues."

Well, I've got news for the networks: In a free market—where providing access to the airwaves they control is not used as a stranglehold in negotiations—the smaller production company doesn't need the up-front cash. Just give him an order for the pilot, Mr. Network, simply because you think his idea's worthwhile—with no strings attached—and see how fast he can find financing from independent sources—even the banks! And why would they pay incremental dollars for product they can as easily take as the quid pro quo for doing business, anyhow? They wouldn't.

One last point about the small production company. Chances are its owners are hoping to be a big production company one day, which is why it went into business in the first place. Unless it is in control of the distribution of its off-network re-runs, it cannot attain its goal. And the networks know that very well.

I am aware that I am talking of vast sums of money here. But the networks like that. They have attempted to characterize this battle as nothing more than a fight between two sets of "financial giants". Well, I'm going to stand here and try very hard not to feel ashamed for having become a financial giant . . . although if NBC, CBS and ABC are giants, I don't think I can be anything more than a very large person. Maybe a very large person. But I thought the name of the free enterprise game was to allow everyone the opportunity to become a large person, a very large person, or a giant. That is exactly what happened to me. I might still be a midget, but for the financial interest and syndication rule.

The deal with CBS for All in the Family was made just before the Rule came into place. Our representatives negotiated long and hard for the right to retain syndication. But the network demanded syndication and negotiated for a substantial financial interest. We didn't appreciate Family's value in syndication because syndication hadn't yet become a business—and that because the networks who controlled such product didn't want it competing with their first run programs. In other words, they warehoused it, which is something they tell us now they will never do again—and so, we capitulated and gave them the syndication rights. On financial interest, we held firm.

It wasn't until the new shows came along—Sanford and Son, Maude, Good Times, One Day at a Time, and others—that the Rule was operative and Embassy, then Tandem, finally in control of its own destiny, was on its way to becoming a very large person indeed.

I believe it is in the public interest for every writer, director, or producer to have the opportunity to grow that way. Often it is necessary. Because a large person can argue more effectively with a giant than a small person. In most cases, the network does not pay enough to cover the costs of production. Take the acclaimed hit series, Hill Street Blues. Last year NBC paid a license fee to the Mary Tyler Moore Company, of $800,00 per episode—but the costs of production averaged approximately $865,000 per episode. Total deficits now exceed $3,230,000. This, despite the fact that the networks earn their money from the sale of advertising from the very first episode. Let me show you how you get to be a real giant in television.

NBC sells some $1,500,000 in advertising time on each original episode of Hill Street Blues . . . and it makes a profit of approximately $250,000 per episode. On every re-run, it nets a profit of approximately $550,000. Producers of course, do not participate in the advertising revenues, no matter what their deficits. So before the networks solicit help from Big Brother Fowler at the FCC to gain a piece of our syndication revenues—in effect becoming our partners—why not become real partners and let us share in their advertising revenues? We have suggested this possibility often, to no avail. Let's face it, giants are not very friendly, and they have big appetites. And I don't want to be fed to them, especially by an agency of my own government.

Speaking of that agency, let's look at its chief server-upper, Chairman Fowler. Les Brown, one of the most informed writers on the TV scene, speaks of Mr. Fowler as a regulatory nihilist, an ideologue who believes free markets are the answer to everything. He came to the FCC, as Brown points out, not to regulate or even de-regulate, but rather, in his own words, to un-regulate—to abolish the speed limit that the FCC adopted for public safety. "Broadcast regulation is shrouded in myths," Fowler once declared in a speech to broadcasters, "Myths about service to the community . . ." It is regrettable that the Chairman of the FCC should think of service to the community as a myth, but it is no wonder that broadcasters award his remarks with standing ovations and that the National Association of Broadcasters—as reported by Brown—jokes about taking up a collection to buy "Key Man" insurance for this political appointee. . . . I am not a fan of Mark Fowler's.

To return to Saturday's New York Times editorial once more—they quote the networks as saying that the Financial Interest and Syndication Rule—"has reduced our share of total expenditures for programming, while the cost of programming has in-

creased dramatically." Poor babies! According to their own research, they project a 70 percent share of audience in 1990, with no decline in real audience—they still own five each of the strongest TV stations in the country—and their combined profits have soared 550 percent in the last decade. Don't cry for them, Argentina!

The Times editorial also says that free market economies work best when regulation is used sparingly. I'd like to question the use of the expression "free market economy." Television is a most unusual industry. It is a distorted free marketplace, distorted by an FCC Commission in 1952, that allocated the broadcast spectrum among local TV stations, so that only three national television networks could develop—giving CBS, NBC and ABC a virtual joint monopoly over the national television audience. If that kind of television represents a free market economy, call me Abe Rosenthal.

There is one more statement in the New York Times editorial to which I take total exception. "Looser regulation is unlikely to have much effect . . . on the quality of programs." Really?

Recently, a group of five jurors gathered for the BANFF International Television Festival to judge 100 hours of television. When the winners were selected, the panel analyzed the list to see if they had anything in common. They did. Virtually all had been independently produced. Even the ABC News documentary that won, "Vietnam Requiem", was made by a couple of independent journalists in San Francisco, rather than by ABC News itself.

"Much of what we didn't like," wrote one of the panelists, "gave us the feeling of being machine-made. The winners in contrast were hand-crafted. They were works, rather than programming, and they smacked of authorship."

I take the use of the word "authorship" to mean the sound of a unique, or original, voice. The kind you hear today on Cheers, Hill Street Blues, St. Elsewhere, Family Ties, all of which are also produced by independent creative forces protected by the financial interest and syndication rule.

It takes a lot of doing for a unique or original voice to be heard in that vast, homogeneous chorus that is network programming today. Because the name of the game for each network when they are deciding what ideas will become scripts, and which scripts become pilots, and which pilots become series, is: "How do I win Tuesday night at 8 o'clock?" Not, for example, "How do I program with more attention to women and minorities? To children and the elderly?"

I submit that when the most important criterion for selecting a show is how it may rate against the competition, the decision will often be made at the expense of taste, creativity, innovation and a sense of responsibility to the public interest. And how well is the public interest being served in the way the war of the ratings is covered? In what other industry is the competition between just three entities reported on so exhaustively, so clinically, and with such hysterical appetite? Newspapers didn't always list the top ten television shows each week. Today, many list all sixty-one shows. The press created the appetite for this monumental bore and something tells me that the public will never be as ravenous for the numbers as the space devoted to them would indicate. Meanwhile, the artificial insinuation of this now earth-shattering trivia has fanned the flames of competition into a virtual conflagration. It often results in lunacy. Such as the lunacy known as "Sweeps Weeks".

Four times a year, the television industry takes a deep breath and plunges into this degrading, competitive ritual. During these high holy days of the TV year, professional market research firms gather demographic data on who is watching what programs. The results are then used by the networks to set advertising rates that profoundly affect profitability. Now the rub is this: During Sweeps Weeks, the regular weekly programming is moved aside—and in its place are presented one-time-only specials and Movies of the Week, with usually exploitive and sometimes salacious titles and advertising.

Throughout Sweeps Weeks, nervous programmers await the new Nielsen and Arbitron ratings the way the faithful watch for puffs of smoke over the Vatican. When this masturbatory exercise is all over, the networks resume their normal broadcast schedule. They refer to this charade as "stunting." My father told me you could go blind from such activity.

What is most disturbing about this kind of short-term lunacy—is that it is not restricted to the television industry. It is part of the national climate. In Congress, Federal agencies, State legislatures, universities, in business generally, and in other spheres of influence, we seem all too ready to sell the future short for a fleeting moment of success. We are witnessing a growing misuse of human potential in a climate that forgives and condones that misuse for short-term gain. It may be the greatest societal disease of our time.

Professor Abernathy, of the Harvard Business School, has suggested that it may have had something to do with the failure of our auto industry to maintain its world dominance—and the same with consumer electronics, steel, and now machine tools.

I think that it has gotten to us on a family and personal level, too. When we speak of what was called the "Me Generation" and the "Culture of Narcissism"—when we speak if the breakdown of institutions—of impulsive marriages and facile divorces—of the rate of crime and the escalating drug culture—of young people graduating from high schools without the ability to read and write—when we speak of a hundred social ills—I wonder if we aren't talking about a trickle-down value system that has begun to consume us all with this need for quick rewards and instant gratification.

The choice of which show a network will put on the air is made, as I indicated, in the context of this same need. The commercial imperative. It appears that a new show, "We Got It Made," may be a hit. It features a nubile young blonde with two breasts—count them, two—who works as a maid for a couple of young men. I mention the breast count because if the show is indeed a hit, you may see another young maid with three breasts on another network. That may not be as funny as it sounds.

I asked a young, talented writer who has been writing for TV just three years to comment on all of this. Here is what he had to say:

"OK, Norman, remember—you promised me this would be anonymous. I'm just a writer, so all I can do is write the script and hope for the best. But in my heart I know that unless I'm working with a more powerful writer/producer like you or Jim Brooks or Steve Bochco, I haven't got a chance. My problem is, I always think about shows the networks say they love, then try to change. I think its because I want to write real people. I don't think they understand real people. Most of them are only 32 or 33, like me—and we all grew up watching a lot of television—I mean, really a lot of television. Then we all went to college and studied communications. I don't know how I escaped this, Norman—maybe it's because I always knew I wanted to write—but I swear, most of those guys at the networks are all confused about what real human behavior is. They ask us to write stupid things for kids because the only thing they know about how kids talk is what they've seen all their lives on television. And on and on.

Sometimes I think TV is not so much a reflection of society as a reflection of other TV shows. And they don't know that. Well, that's about it. Good luck with your speech."

I repeat, there are no villians in the network executive suite. For a moment, put yourself in the place of one such exec. He wakes up one morning with his newspaper at the breakfast table and sees that his team has only placed two shows in the Top Ten. He may have anticipated it, but he doesn't like to see it. His breakfast doesn't taste too good and it isn't the best time he's ever spent with his wife and kids.

Although with the baby-boom in network executives, chances are he doesn't have a wife and kids. Newton Minow once called television a vast wasteland. I often think of TV executive suites as a vast playpen. In any event, he leaves the house and on the way to work, picks up a copy of the Wall Street Journal. Earnings are projected down as a result of recent ratings performance. When he arrives in his office, there is a still-warm xerox of the overnight ratings from last night. Once more his network has failed to win.

His first appointment is with a new writer/director, a young man of unusual talent, tomorrow's Rod Serling or Paddy Chayevsky. And this writer has an innovative notion: A situation comedy about a Chinese family. I submit that our executive is in no frame of mind to hear, let along accept, an innovative idea. Risk-taking is long-term thinking. So he asks: "The daughter—uh, could she be blonde?"

There are no villians here. It isn't easy to program 22 hours a week: These are mean, difficult jobs, and I respect many of the men and women in network programming. It's just that the writer coming to the network with a new concept is coming from another place. Not that they don't wish to score high in the ratings, too—but the writers' means to that end is the very best execution of his concept. The network will always, always seek to bend the concept, and the teleplay, and the casting, and the editing, to meet the needs of the marketplace as it perceives those needs at any given time.

Now this battle is an honest one. No one will disagree with Chairman Fowler that network television is a business—and so the network program executive has every right to inveigh upon the writer, the director, and the producer, to make the product appeal to a vast enough audience that will insure the ratings for which the network is in business. But what I am most hopeful this audience will understand, is

the need for this battle to continue. Viewers *did* prefer a more mature MASH, with its serio-comic overtones. So—diminish the effect and the strength of the independent writer/creator and the battle is over. It is in the public interest that that battle never be over.

I want to put this another way because I can't say it strongly enough. If a network must, in its opinion, sacrifice quality for ratings, it will. So will some writers. We do have our hacks. I am suggesting, however, that a writer's gut instinct is to believe that it is only the quality of his or her script that will ensure the ratings. That is all the writer has to go on, and so that is always the way the writer begins.

Whatever we write, good, bad, or indifferent—and no one wishes to write a bad script—we are all writing for the smile of approval from the first person to read us—we are all writing for the respect of our peers—and we all begin by believing that any and all success will depend upon the quality of our script.

That feeling is pure in the worst of writers—and it is that purity in the best of writers that affords us our finest moments in literature, films, or in television. The place from which the networks come is also pure, but totally different. And so, while there are writers who will compromise their scripts in any fashion to please a network, there are also writers who will not. They are the writers who have stood up to the networks time and time again, to deliver from within independent companies, virtually every one of the shows you have most applauded. I repeat, virtually every one of the shows you have most applauded.

The current hero in creative television—the man who delivers the 17 Emmy Award nominee, Hill Street Blues, for the Mary Tyler Moore Company, is Steven Bochco. My plea to you today is "Help keep Steven Bochco strong!" The writer/producer of Hill Street Blues may not need the help as much as he did in earlier years, because it is a network axiom, as it is elsewhere, that you don't fool with success.

But there are other Steven Bochcos who have not caught the brass ring as yet. And tomorrow's Steven Bochco—the innovator, the brilliant writer not yet on the scene—for him, for her—and for a viewing public that must not be denied the authorship of these fresh talents—I speak for all of them when I say that we must not centralize more power and control in network hands.

There is a bill in the Congress to provide a five-year moratorium to study this matter further. Let's take that time to conduct a major examination of all of television. Including further study of exactly what it is doing to us. Let's turn loose our best thinkers and give them the widest possible circulation in the popular press.

Meanwhile, there is Steven Bochco, and all the Steven Bochcos to be.

I thank you for the opportunity to speak to you today, and—help keep Steven Bochco strong!

[The following information was subsequently received for the record:]

QUESTIONS OF SENATOR GOLDWATER AND THE ANSWERS THERETO

Question 1. Now that you have built a reputation for yourself, please explain how repeal of these rules would affect your company?

Answer. It is my considered opinion that no one in the television production community has anywhere near the power of the three networks. Regardless of how successful I am I still have only three sources of entry into the marketplace. If they turn me down or make unreasonable demands I have no other place to go with my product. I don't believe that past successes will be a barrier to the networks seeking to take full advantage of whatever additional power is given to them by relaxation or repeal of these rules.

Also, it will permit the networks to intrude even further into the creative process as our "partner." In that capacity their demands, based on past experience, will be even more intolerable. Fresh ideas will never see the light of day.

My company has developed a reputation following many years of successful programs. I have been able to build an organization that encourages creative excellence because of these rules. Repeal will remove much of my incentive to get back into writing, as I have been lately with a new show about a young hispanic-American man. It will discourage my company from attempting to bring fresh, admittedly risky, ideas to the networks. But most importantly, I fear that repeal will cause young, talented writers, those who have not yet had their first success, to shy away from television.

Question 2. If the networks negotiate for financial interest or syndication rights, won't they have to pay more to you for those rights? In other words, do these rules change only the manner in which the same amount of potential profit is earned so

that what we are talking about is more a question of shifting profits than protecting independent creativity or program diversity?

Answer. In an ideal economic world, a change in the rule would simply mean that producers would be compensated for syndication rights up front, instead of after several years of successful network exhibition of their program. However, two factors make the economics of the television industry less than ideal.

First and foremost, there are only three entities that reach into almost every television home—ABC, CBS & NBC. Sometimes a producer has only one option from the outset—for example, CBS may be the only network looking for a half-hour series suitable for 8:00 p.m. on a week night when young viewers are likely to watch TV. When the producer presents an idea to that network, the network holds all the cards. The producer can either agree to the networks' terms or not have his program aired. That is what happened to me when I relinquished syndication rights to "All In The Family" to CBS—I had no choice, no leverage, no alternative. For my shows to have any value, they must get onto a network stage. Even with an established track record of successful programs, the new show I am hoping a network will accept has no guarantee of success. The networks are still in a position to demand rights as the price of getting that show on their stage.

Second, producers are not in a secure business where they can be guaranteed a return of costs associated with a product, plus a modest profit. Television production is a risky business where one can lose money, or in rare cases, hit the jackpot. Most of us are in this business because of, not in spite of, that risk. We believe that if we create the best possible product we are capable of producing, the American public will like it. We put our time, money, emotional and intellectual energy into our creations. Nobody wants to create a mediocre program—we all strive to hit that jackpot.

Even assuming that networks would pay for financial interest or syndication rights (a premise I question), chances are while such arrangements might keep us from losing money, we could no longer aim for the brass ring. Without the chance to reap the fruits of our labors, incentive to enter and remain in this business is diminished substantially. When profits do not adequately reflect success, creativity is dampened. I may knock myself out for a program that is mine, while I may not be so whole-hearted about a program in which I own a majority interest.

Senator GOLDWATER. Thank you very much, Mr. Lear.

Mr. Hill?

Mr. HILL. Good morning, Mr. Chairman, members of the committee. My name is Len Hill. Along with Philip Mandelker, I am partnered in an independent production; company called, not surprisingly, Hill/Mandelker Films. Since our formation in 1980, we have produced prime time programing for all three broadcasting networks. We are an independent company.

The arrogant rhetoric of Mr. Krattenmaker aside, we are not part of a "penny ante struggle of behemoths." We pay our own staff, we buy our own insurance, we fly tourist, we take taxis.

Before I set up my company in 1980, I was vice president, ABC TV Movies, and for the years prior to that I was employed at NBC, Paramount and Universal.

So I come before you this morning as a small businessman. The FCC contends that I, and others like me, will benefit from the deregulation of the financial interest and syndication rules. Both the Justice Department and the networks support the FCC in this belief, and therein lies the reason for my being here this morning.

I am not a lawyer, I am not an economist, but I am an independent producer, and I know, surely as I sit here, that my company is gravely threatened by any effort to weaken the existing rules. The health of Hill/Mandelker Films is, perhaps sadly, not a great public policy issue, but the health of the small businessman is. Chairman Fowler's doctrinaire attitudes aside, the free enterprise system is still fundamental to the American way of life.

And I am not alone in contending that any vacation of these rules would be ruinous. Every independent production company joins me in this. In fact, when the FCC had its hearings, a Mad Hatter procedure if there ever was one, where the sentence was declared well before the verdict was heard, they had submissions from over 60 independent production companies. Only two of those filing—and one of them was from somebody who was a CBS employee—only two of those independents supported the FCC contention that the vacation of the rules would in any sense make the life of the independent better.

It is ironic that the networks whose monopoly position was created by Federal regulation inadvertently, perhaps, in 1952, now argue that regulation places on them an unfair burden. The power of the network is not of their invention, it is not of their discovery, it is not of their brilliance; the power of the networks is a fact of regulation. They are not competitors in a free and open marketplace.

The networks argue that if the rules are relaxed, the independent producer will benefit by having three additional entrants in the syndication marketplace. The audacity of that contention defies description. How they got Chairman Fowler to believe it goes beyond even my imagination. The networks would not enter the market. The networks would trample the market.

An independent producer simply cannot negotiate with a network. The fact that the FCC studied this issue for 4 years and failed to understand that is again something to ponder. The three networks simply have absolute control over access to broadcasting. They are the gatekeepers. There is no other game in town. You play at the network table or you simply do not play.

Our experience with a short-lived series—sadly, not one that belongs in the hallmarks of broadcasting—"Tucker's Witch," may illustrate the nature of network dominance. When CBS ordered our series pilot, they told us what the network license fee would be—not just the license fee for the pilot, but the license fee for the first 110 episodes of that series. When we felt the offer was far too low, the network offered us one option: Decline the order.

Contractual provisions prevented us from taking our pilot to another network. We could not negotiate. We could, and we did, capitulate. We were either on their air, Senator Packwood, or we were out of our business. There is no negotiation.

Where there was negotiation was in the syndication marketplace. No matter how inadequate the network offer was, we had 28 separate offers from syndicaters and distributers for the foreign rights to our series.

It was in selecting among those 28 rights that we were able to custom tailor a deal that allowed our company to protect its independence. We were able to negotiate a distribution deal in an active and competitive syndication marketplace, a marketplace that was created by the 1970 regulations.

Absent regulation, there would not have been 28 bids. Absent regulation, network financial interest in and participation over our series would have been the quid pro quo of our doing business. It was pre-rule; it would be again.

Further, a weakening of the rules would clearly bring about a numbing centralization of creative decisionmaking. A small group of network executives would become the dominant force not just in broadcasting, but in producing as well. They would become the virtual commissars of culture.

The issue is not the competence of these executives. The issue, gentlemen, is the unreasonable centralization of their power. If the rules are weakened, the independent producer would become a field hand paid by, and wholly subservient to, three massive broadcasting chains.

The networks will not be our partners. They will be our employers. They will be our overlords. Network participation in financial interest would provide the independent not with a choice, Senator Goldwater, but with a most ominous echo——

Absent regulations, the networks would have the unreasonable privilege of being both buyer and supplier, both scheduler and producer, both umpire and player, finally. Deregulation would allow the network to extend special promotion, special advertising, and special scheduling considerations to their favorite supplier: Themselves.

What small businessman can afford to play against the umpire's favorite team?

If there is a problem with the current rules, it is that they are not strong enough. While they do indeed limit the networks' ability to extort syndication rights from producers supplying from the outside, they place no regulation whatsoever on the amount of in-house production the networks undertake. And all three networks are currently gearing up to massively increase their in-house production which is not restricted by the current rules.

Gentlemen, 3 years ago when I left ABC, I had a dream. It was a simple and I would argue uniquely American dream, that I could form a small company, and that I could take that company out in a competitive and free marketplace. In pursuit of that dream I put up my house, I risked my life's savings, and now, just as my company is beginning to achieve a modicum of success, I confront a very real possibility that the Government will deregulate me out of existence. I cannot believe this is the intent of this committee or the intent of the U.S. Senate. The existing rules are simple, they promote competition, they require no bureaucratic overseer.

Do not be misled by bogus economic models created by doctrinaire bureaucrats. The current system works. It should be strengthened. It should not be dismantled.

Thank you for your time.

[The statement follows:]

STATEMENT OF LEONARD HILL, PARTNER IN HILL/MANDELKER FILMS

Good morning, Mr. Chairman, members of the Subcommittee, my name is Len Hill. Along with Philip Mandelker, I am partnered in a production company named, not surprisingly, Hill/Mandelker Films. Since its formation in 1980, our company has made primetime programming for all three Networks. For three years immediately prior to forming my own company I was Vice President, Television Movies, for ABC. Prior to that, I worked at NBC in the area of dramatic series.

I come before you as a small businessman. In the particular parlance of these proceedings, I am a risk-bearing independent producer, that much discussed but seldom seen creature which the FCC contends will benefit from the elimination of the Fi-

nancial Interest and Syndication Rules. Both the Justice Department and the Networks support the FCC in this belief. And therein lies the reason for my being here today.

I am not an economist nor a lawyer—but I am an independent producer—and I know that any attempt to weaken the Financial Interest Rules will gravely threaten my company. The health of Hill/Mandelker Films is, sadly, not an important public policy issue. But the health of the small businessman is. Chairman Fowler's doctrines notwithstanding, the free enterprise system is fundamental to the American way of life. I would like to think that the success or failure of my company would reflect on my abilities, not on the whimsy of federal regulators.

I am not alone in believing that the weakening of the Rules would be ruinous. Every active independent company holds the same position. So does the Writers Guild, the Directors Guild, the Screen Actors Guild, the IATSE and the Caucus for Producers, Writers and Directors. The sole beneficiaries of the proposed deregulation will be the three Networks. The unanimity of opposition is unprecedented.

It's ironic that the Networks, whose monopoly position was inadvertently created by Federal regulation in 1952, would now argue that regulation is unreasonable. The power of the Networks is not a result of their discovery or inventiveness—their power stems directly from the arbitrary allocation of a scarce public resource—prime positions on the VHF broadcasting spectrum. Networks are not competitors in an open market—yet they want the freedom to behave as if they were.

While no one likes regulation, the fact is that certain rules must be established to protect the free enterprise system against the cancerous concentration of power. The energy of the individual must be preferred to the dead hand of monopoly. The Financial Interest Rules were conceived to encourage competition in the marketplace, and they have succeeded admirably.

Fundamental to the 1970 regulations is the belief that Networks have an intrinsically unfair advantage. It was no accident that before the regulations the Networks owned a financial interest in 93 percent of the shows on the air. In the past 13 years nothing has materially changed the Networks' inherently advantaged position. Why then should the rules be weakened?

The Networks argue that if the rules were relaxed the independent producer would benefit by having three additional entrants in the syndication market. The audacity of this argument is remarkable. The Networks wouldn't enter the market, they would trample it.

An independent producer can't negotiate with a Network. Please consider this point as primary to the entire issue before us. The three Networks have absolute control over access to prime time broadcasting. They are the gatekeepers. There is no other game in town. You play at the Network table or you don't play.

Our experience with a short-lived series, "Tucker's Witch," may illustrate the nature of Network dominance. When CBS ordered our series pilot, they also told us what our license fee would be—not just the license fee for the pilot, but for each of the first 110 episodes. We thought the offer was too low, but our only option was to decline the order. We couldn't take the pilot to another Network. Contractual provisions included in the standard development deal precluded that. We couldn't negotiate. We could, and did, capitulate. We were either on their air or out of business.

To make up for the financial shortfall caused by low Network license fees, we turned to the syndication market. Owing to the positive impact of the 1970 regulations, this is a vital and competitive market. Twenty-eight different companies bid on the foreign distribution rights to our series. We were able to negotiate a distribution agreement custom tailored to our needs.

Absent regulation there wouldn't have been 28 bids. Absent regulation Network financial participation in and control over the non-network exploitation of our product would have been the quid pro quo of doing business. It was pre-rule. It would be again.

A weakening of the rules would also have a disastrous impact on the quality and diversity of programs. In recent years, the Networks have garnished from the program suppliers a comprehensive array of creative approvals. With apparent disregard for Guild agreements, the Networks attempt to control the producer's selection of director, cast, cameramen, editors and composers.

Some cynics conclude that because Network interference in the creative process occurs in spite of the rules that the rules are, therefore, unnecessary. True, the rules may only be sandbags against the barrage of massive Network artillery—but they are still a defense. Sandbags are better than surrender.

If the Networks are allowed to become the producer's financial partner, the centralization of creative decision making will increase markedly. A small group of

Network executives will dominate both the broadcasting and production industries. They will become virtual Commissars of Culture.

The issue is not the competence of the Network executives but the unreasonable concentration of their power. If the rules are weakened, the independent producer will become a field hand, paid by and wholly subservient to, the three massive broadcast chains.

Network participation in syndication would enfeeble the producer's ability to fight for different or controversial programming. In this regard, consider the experience my partner had when he developed a project for CBS based on the Marilyn French book, "The Women's Room." On reading the script CBS concluded that it was too angry and insufficiently entertaining. Had the Network owned a financial interest in the script, Mandelker would have had two choices: neuter the approach or see the project shelved. Because CBS was prohibited from encumbering the project (movies and series have different holdback provisions), Mandelker had a third choice: He could take it to another Network. Though initially developed with CBS, "The Women's Room" was broadcast by ABC. It achieved a 45 share. There is a long list of similar situations.[1]

The Networks won't be our partners, they will be our overloards. Network participation in financial interest would provide the independent not with a choice, but with an ominous echo. . . .

Absent regulation the Network would have the unnatural privilege of being both scheduler and supplier, both umpire and player. Remember that many things in addition to content control a show's commercial value—timeslot placement, on-air promotion, print advertising are all critical to determining the viability of even the finest show. But all of these non-content factors are controlled solely by the Network. Deregulation would allow the Network to extend special promotion and scheduling considerations to their favorite supplier—themselves. Far from providing the independent a choice, they would present him with the proverbial offer he couldn't refuse.

And what would happen when it comes down to the critical questions of series renewal? Do you want to be the producer whose show is dumped by the Network in favor of one in which they have a substantial financial interest? Who wants to play against the umpire's favorite team?

The Networks want to participate in the producer's off-network revenues. By extension, then, shouldn't the producer have the right to participate in the on-network profits of his or her show? If a show is a hit the Network will greatly increase the price it charges for advertising time in that show—but the producer has no benefit. The Network continues to pay the same license fee while reaping increasingly huge profits from advertisers. The producer's only consolation is the increased syndication value of his product. When the Networks are willing to discuss producer participation in advertising revenue, the producers will be happy to discuss Network participation in syndication dollars.

Chairman Fowler has proposed what he calls a compromise. His proposal is in fact only a modified catastrophe. It glibly dismisses the importance of TV movies and miniseries which are often the most important elements of the independent production entity.[2] It requires the establishment of a new body of federal overseers to police series syndication. The so-called compromise is an ill-conceived effort to disguise the fundamental flaws in the whole wrongheaded effort to vacate the regulations.

If there is a problem with the current rules, it is that they are not strong enough. While they limit Network involvement in product supplied from the outside, they in no way restrict the amount of product the Networks can produce themselves. Networks should be precluded by regulation from inhouse production or the intent of the current regulations can easily be circumvented. We need to strengthen the regulations, not weaken them.

Three years ago I had a dream, a uniquely American dream, that I could form a small company which could compete freely in the programming marketplace. Like so many other small businessmen and women, I risked my home and my life savings in pursuit of that dream. Now, just as my company has begun to achieve a modicum

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[1] The following TV movies come to mind as having been developed at one Network but produced for another: "Autobiography of Miss Jane Pittman," "Playing for Time," "Gideon's Trumpet." "The Choice," "Beatrice," "Off the Minnesota Strip," "Sessions," "Winds of Kitty Hawk," "Haunting Passion," "Intimate Stranger," "Executioners Song," and "Inside the Third Reich."

[2] In the 1982-83 season there were approximately 90 television movies of which roughly 60 were made by small companies.

of success I confront the very real possibility that the government will deregulate me out of existence.

The existing rules are simple. They promote competition. They encourage diversity. They require no bureaucratic overseer. Don't be misled by economic models created in a bureaucratic vacuum. The current system works. It should be strengthened, not dismantled.

I urge this Subcommittee to support S. 1707. Thank you for your time.

Senator GOLDWATER. Thank you very much, Mr. Hill.

Mr. Burch?

Mr. BURCH. Thank you, Mr. Chairman.

My name is Dean Burch. I appear here as cocounsel for the Committee for Prudent Deregulation, but I would like to tailor my remarks today to my role as counsel for the Association of Independent Television Stations, or INTV.

Mr. Chairman, I also was the Chairman of the Federal Communications Commission at the time these rules were adopted. I am not here as an apologist for the rules. I am not here, frankly, to justify any actions that I took in 1970. I would be happy if any member has any interest to review the bidding that went on at that time, but I think it might suffice to say that those rules in 1970 were in a real sense the result of an investigation that began in 1938, the chain broadcast investigation, and from 1938 until 1970, including hearings before this very committee, the Federal Communications Commission, the Senate, the House, and the Department of Justice were constantly concerned about the fact that the networks dominated American, television.

It has been said, and I agree, that when the Sixth Report and Order was adopted which set up our VHF allocation policy, it guaranteed that there would be three and only three networks. The Commission has spent a great deal of time since then trying to ameliorate that problem, and one of the things that they have done and which has been quite successful, I might add, is the encouragement of the independent television station.

At the time these rules were adopted there were approximately 80-independent television stations. There are now about 179-independent television stations.

Now, what is an independent television station? It is a station that is not affiliated with any network; that must provide 24 hours a day of its own programing, that has no network feed, no network button. And so it must be out there scrounging for programing every single day.

What specifically is our concern about these rules? Senator Packwood, you suggested this was a David versus Goliath struggle. Other commentators have suggested that it is Goliath versus Goliath. I would suggest that the independents are the true stakeholders in this proceeding. No independent is going to receive any portion of the syndication or financial interest profits. What we are looking for is a free and competitive marketplace in which we can compete for programing product from someone other than our direct competitor.

Now, how does the syndication market work? In a nutshell, when a program goes off the network, or even while it is still on the network, if it has been on a long enough period, it is placed in what is known as the syndication market. At that time, independents, net-

work affiliates, network owned and operated stations, all are given an opportunity to purchase the right to air that show.

Now, there are certain aspects of that marketplace that are very important. The independents must be given advance notice when the shows are going to be available, they must have an opportunity to bid on these shows, and they must have a chance to have their bid considered.

Now, a great deal has been made by the Government agencies about the necessity for collusion before the independents would be harmed. Let me tell you exactly what our concerns are about the syndication marketplace.

If the networks become dominant in that marketplace—and I see no reason to think they would not become dominant. After all, they are the only three entities through which all programing, all off-network programing must go and if a network as a reasonable, profitmaking corporation, determined that it was in its interest, first of all, to show the program on the network, then to make it available to the owned and operated stations, and then to make it available on a first basis to the affiliates of that network, I do not think that requires either collusion or frankly that it is a violation of any antitrust law. The independents would be disserved throughout that process. They would lose in the top markets where the networks have owned and operated stations, the top eleven marketplaces in the United States, a place where the independents are quite strong today, and they are strong because they are able to offer off-network programing on a timely basis.

Just a word about the tentative decision. Under the tentative decision, the networks would be allowed to institutionalize a sort of warehousing in that they would not even be required to seek a syndicator for a show until the fifth year of that show.

Now, "Hill Street Blues," for example, is in its fourth year, and yet it is being syndicated this year for availability at the end of 5 years. That advance notice is terribly important to independent television stations so they cannot only schedule their programs but can determine their budgets, how much money is going to be made available for what show.

One other thing I would like to comment on the television syndication marketplace. There are not a lot of shows going into this marketplace each year. There are only a very few shows which are extremely valuable, and if only one or two shows gets diverted from the independent marketplace, as you will hear on Friday, the independents will be badly disadvantaged.

We feel that the independents serve Mrs. Murphy, they serve that machinist's wife in Dayton which we seem to spend so much time talking about, and they serve her because they offer her a diversity of time so that she can watch shows at 7 o'clock in the evening rather than 11:30 at night, or she can watch them at 4 in the afternoon.

Now, we are subject to the criticism that after all, these are off-network shows, they have already been seen, but they have not already been seen by everybody, and they have not already been seen at a time when it is convenient.

The public does in fact profit from the independent television stations, and that alone is a public interest reason for these rules.

One thing I would like to point out, too, Senator Packwood, there has been no testimony from this table, nor will you hear any, that these rules have any really great costs. They do not cost the public anything, and in my opinion, they give the public the opportunity for great benefits.

Thank you very much, sir.

[The statement of follows:]

STATEMENT OF DEAN BURCH, COUNSEL FOR ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.

My name is Dean Burch, and I am delighted to appear here today as counsel for the Association of Independent Telelvision Stations, Inc. (INTV). I am also co-counsel for the Committee for Prudent Deregulation, but my remarks today will be as representative for INTV. Other panelists will be speaking for CPD. INTV is the principal industry association of America's independent television stations, with nearly 100 member stations, none of which is affiliated with any network, located in 70 television markets.

I am pleased that the Subcommittee shows a keen interest in the Financial Interest and Syndication Rule. INTV supports passage of S. 1707. We believe the bill would allow all concerned to see how the television market develops and, at a more appropriate time, decide whether network domination has lessened sufficiently to permit them to participate in any way in the syndication process.

The Financial Interest and Syndication Rule proceeding at the Federal Communications Commission and its counterpart in Congress have been billed as Goliath v. Goliath. Two rich industries are seen as battling each other for even larger profits. This characterization is wrong for several reasons. First, it ignores the essential element of network dominance as well as creative control over programming.

However, the Goliath v. Goliath scenario is grievously incorrect for a second vital reason. It entirely overlooks the positive effects of the current Rule—or the devestation of the Rule's rescission—on America's independent television stations.

Indepentent stations are truly the stakeholders in this proceeding. None of the oft-discussed profits from syndication will flow to the independents. Our goal is very simple—a free and robust marketplace in which we can compete for programming with our true competitors, the network affiliates and owned-and-operated stations.

Independents will be injured severely if the Financial Interest and Syndication Rule is rescinded or is modified in a way that will allow the networks to be involved at all with the syndication process. It is important to stress that allowing the networks to take a significant financial interest in programs will allow them to control the syndication of off-network programs.

Independent stations have a stake in this question because their lifeblood is the most recent, most popular off-network programs. These syndicated programs, which recently have ended their network runs, or are still on the networks, bring independent television stations their highest ratings and greatest profits. Off-network programs allow independent stations to compete successfully with network affiliates. Networks would like to lessen that competition—and could if they controlled syndication of independent television's most popular programs.

Independent television stations have made great strides due to the availability of off-network programs. Before the Rule took effect in 1970, there were about 75 independent stations on the air. Today, there are more than 180 independent stations. As a group, their ratings and profitability are higher than ever. These increased profits are used to support more local news and local sports programs. Independents also invest these profits in such first-run, award-winning, non-network programs as "Golda," "PM Magazine" and "The Muppet Show." These are programs the public would not have seen if independent stations had not invested in them.

Independent stations want to obtain programming from those whose only concern is profits. This allows independents to bargain openly and fairly over availability and price. But when the seller—or the force behind the seller—also is concerned with its network, its owned stations, its affiliates and competing with the very stations with which it is negotiating to sell programming, the independents believe the deck is stacked against them.

Independents' concern is not simply warehousing—about which you will hear a great deal. Our concern is that if networks own and syndicate programs, their self-interest will lead them to prefer their owned-and-operated stations and their affiliates over independents. There is a very real question whether such preference would violate antitrust laws.

Why do the networks want the rule rescinded?

First, there are several red herrings that must be swept away. The Rule has nothing to do with minority group advancement. It simply is not true that in the absence of the Rule, minority groups would appear on television in greater numbers and be given opportunities to direct, produce and write television programs. I wish there were a rule that would lead to that result, but the financial Interest and Syndication Rule, or its absence, is not it. In fact, a large number of minority groups have opposed the rule's repeal. The networks could have more minority programming and minority participation in programming tomorrow, if they wanted it.

Also, free television will not disappear no matter what the decision in on this question. The networks will continue to invest where they can earn the best return on their money. With over 80 percent of the viewing audience every night tuned to the networks, the best investment clearly is in prime-time television.

The networks say their primary concern is competition from the new media. At best, this fear becomes reality far in the future. Direct broadcast satellites and low power television still are in the development stage. While cable television has grown, there are reports of cable viewing dropping, and cable networks continue to go out of business.

In fact, the networks' hidden agenda, besides greater profits, is concern with what actually is their strongest competition—independent stations. These stations have grown in number and strength, but they are dependent upon the very programs the networks would like to control in syndication. No wonder the independent stations oppose rescission of the rule or modification that would allow the networks even indirectly into syndication.

However, the FCC proposes to give the networks unlimited profit participation in off-network programming. Even though the Commission would not let the networks control syndication directly until 1990, financial participation in fact would give the networks control now. A significant ownership percentage and control cannot be separated. Additionally, the Commission would strengthen the networks' hand by allowing them to select program syndicators. The networks, then, would control programming not only on owned and affiliated stations throughout the country, but also on independent stations. That is, three networks will control programming on nearly every television station in America.

Here we must not forget the most important player—the viewing public. Independent stations enable viewers to watch the shows they want to watch when they want to watch them. If networks controlled the syndication process, not only could they prevent independents from obtaining off-network programs, but could put restrictions on the scheduling of those programs that independents were able to buy. This would be against the public interest, and would injure independent television stations.

There have been suggestions that the parties resolve this dispute among themselves. In its Comments inthe Tentative Decision, INTV put on the table a reasonable compromise proposal. We stand ready to meet with anybody at any time to discuss that proposal.

However, the best solution is passage of S. 1707, which would allow the Commission and all parties to see how the television market develops over the next five years. If then, as the networks predict, new technologies are serious competitors, that is the time to look at the Rule again. If the networks remain as dominant as they are now, the Rule must stay in place.

Thank you.

[The following information was subsequently received for the record:]

QUESTIONS OF THE COMMITTEE AND THE ANSWERS THERETO

Question 1. It is claimed that the idea of harm to independent stations from repeal or weakening of the rules is an invented fantasy lacking any substance, since any collusion among networks to harm independents would be easily detectable. How would you respond to this claim?

Answer. Collusion among the three television networks to harm independent television stations would not be easily detectable. The Department of Justice, the agency responsible for enforcing the federal antitrust laws, specifically observed in its January 26, 1983 comments to the FCC that "it is unclear . . . how likely detection and effective prosecution would be under the Sherman Act in cases of tacit collusion. . . . Thus, the Department is not confident that the antitrust laws can be relied upon as the most effective tool for ensuring against possible anticompetitive

network practices in this area." DOJ also found that the networks have both the ability and incentive to "collude tacitly to reduce the supply of off-network programming."

Furthermore, it is not necessary for the networks to collude to hurt independent stations. They could, individually as well as collectively, favor their own affiliates over independents in syndicating their popular off-network series and otherwise obstruct independents' access to the programming that is their lifeblood.

Question 2. It has been argued that the small number of networks is the only source of bargaining power they have and since the rules do not change that number, there is no way the rules could foster a more diverse program supply or increase license fees paid to producers. Would you please comment on this reasoning and discuss what benefits you believe the rules do provide?

Answer. The rules do not change the number of television networks in the United States; only a total alteration of the FCC's 30-year-1 old television channel allocation scheme could make additional networks possible. What the rules do accomplish is to prevent the networks from monopolizing the program supply market. The FCC adopted the rules because it perceived a dangerous trend toward network monopolization in this market.

The rules do not increase license fees paid to producers. That is not their intent, and it is not a legitimate subject of federal regulation. However, by prohibiting network ownership of television programs and the syndication rights to those programs, the rules open greater opportunities for new and independent sources of program supply to enter the market and to remain financially independent of the networks. This financial independence allows independent producers to flourish and to develop new and diverse programming for the networks and for independent station exhibition as well. Finally, by preventing the networks from controlling and limiting the flow of syndicated programs to their competitors, the independent stations, the rules permit the independents to freely purchase and exhibit a greater variety of programming.

Question 3. The networks claim they would see no share of series syndication profits for another five years, even if the rules were repealed today, because they say a series project must first go through script and plot stages and then be on the air for about four years to develop sufficient episodes for the syndication market. They argue that S. 1707 would add another five years to that delay. Do you have any comment on this matter?

Answer. If the rules were repealed today, the networks could begin to reap profits from syndication immediately. Among other things, they could obtain syndication rights to programs already on the air and programs in the production pipeline. Since syndication rights to popular programs typically are "pre-sold" (that is, sold long before the program will actually be released for syndicated exhibition), syndication profits are often reaped very early in a program's life. Moreover, programs are sold into syndication in foreign countries, including Canada, as soon as they begin their domestic network runs. If the rules were repealed, the networks could begin collecting profits from syndication as soon as they desired.

The purpose of S.1707 is not to delay the enjoyment of syndication profits by networks. Its purpose is to permit the emerging television marketplace to develop, in order that Congress and the FCC can make an informed judgment as to whether that marketplace will be sufficiently commpetitive to permit the networks to participate in the syndication business without injury to the public.

Senator GOLDWATER. Thank you, Mr. Burch.

Do you have questions, Mr. Chairman?

The CHAIRMAN. Mr. Hill, your background was initially ABC and NBC before you formed your own company?

Mr. HILL. Prior to that I was an employee at Universal and Paramount.

The CHAIRMAN. The reason I ask is while your company may be doing well, your career does not seem unextraordinary in the sense that lots of people have jumped back and forth between the movies and the networks, so much so that everybody seems to know what everybody is doing.

Is that a fair statement?

Mr. HILL. I think there may be certain similarities to producers' careers and politicians' careers.

The CHAIRMAN. The reason I ask is that the argument of collusion is brought up frequently. But I find it hard to believe that the networks could successfully collude when you have such a leaping back and forth of personnel who one day may have been involved in the collusion, if there were any, and the next day they are working for somebody else on the outside trying to show collusion.

If you were in the networks, how could you carry it off in such a way, with such a small group of people, that you knew the circle of collusion could not be broken?

Mr. HILL. It need not be that secretive. Let me cite a very specific case that affects my company quite directly.

Three and a half or four years ago, the standard license period for a television movie was 3 years, which meant if you were NBC and I was doing a movie for you, you would license two runs in prime time over 3 years. CBS decided one Wednesday afternoon that they wanted 4-year license. Now, for the producer that creates a terrible hardship because that is yet again another 33 percent longer time he must wait until he can put his project in domestic syndication where profits can be made. CBS did that on Wednesday, and by Monday morning ABC and NBC had engaged in what was not called collusion but which the Justice Department I understand calls curiously parallel practices.

The danger here is not that there are evil men lurking in dark rooms engaged in nefarious behavior. The danger is there is such a concentration of power that they will behave in such parallel fashion, and that there is finally no recourse for the independent producer when he turns from CBS who is offering him a 4-year term only to discover that NBC and ABC are doing the same.

I think that carries over to all.

The CHAIRMAN. Now, is CBS always the lead in this? If any one of the networks does something, then the other two automatically follow?

Mr. HILL. There is a history of parallel practice which is almost spine chilling.

The CHAIRMAN. But does it matter who makes the initial start?

Mr. HILL. It does not.

The CHAIRMAN. The other two just automatically follow, no matter which one does it?

Mr. HILL. That does seem to be the practice.

It is also true if you look at their calendars, everybody starts the new series at the same time, everybody orders pilots at the same time, everybody reviews those pilots and announces their schedule at more or less the same time. You cannot take your pilot from one network, if they give you a bad deal, and sell it to another, even in the absence of the contractual provision that exists in the deal, because the timing is not there. You are locked into an oligopoly. Our only protection is regulation.

The CHAIRMAN. Now, let me ask you. You used the word "gatekeeper." I have heard Mr. Valenti use it before. You have got three networks, and if you cannot sell a program to the three networks, you are in a bind. I think Mr. Valenti may have even said at one time in that meeting in my office you have only one because if one of them turns you down, the other two are not likely to touch it.

Do I fairly state that?

Mr. HILL. We might have a difference of opinion on that.

The CHAIRMAN. Well, let me pose it to Mr. Valenti.

Do I accurately state what you said?

Mr. VALENTI. You accurately state it. As a matter of fact, Senator, court documents when the networks were being prosecuted by the U.S. Department of Justice are available. ABC in open court stipulated that they knew, and all the networks knew what each of them were offering, what each of them were discarding and turning down, and the terms and conditions that each of them were asking and offering. They said this in open court. That is no secret.

Indeed, Senator, I will not read it to you, but if you just take the transcript of March 14, 1983 testimony before the FCC, Stanley Gorinson, speaking for the Department of Justice, said, and I have it here, quite explicitly that:

> The overt collusion, an agreement to restrain trade, is policeable under the antitrust laws. On the other hand, passive collusion, consciously parallel conduct without explicit agreement between the networks is significantly more difficult to detect and to prosecute.

Therefore he says: "The antitrust laws are not the most effective tool for deterring possible anticompetitive practices in this narrow area."

The CHAIRMAN. Now, let me go back, if I might, to Mr. Hill.

Mr. Hill, you indicated you might not have the same answer.

Have you had a situation where you tried to sell a program to one network and were turned down and went to another and they considered it?

Mr. HILL. Yes.

The CHAIRMAN. You have?

Mr. HILL. Yes, but I would argue curiously that makes the case for retention of the rules. My partner conceived of doing a movie based on the Marilyn French book "The Women's Room." He sold that idea to CBS. Carol Sebieski did the script. CBS read the script and determined that it was much too angry, it was not balanced, and asked that the project be homogenized. Because CBS did not control syndication, because CBS did not have a financial interest in it, Phillip was able to wait a 3-month period and present it to ABC with the stipulation that he would not change the Sebieski script. ABC elected to go forward with the project, and though CBS originally funded the development, ABC did it. Had CBS controlled syndication, had CBS had a financial interest, they would have given Philip simply two alternatives, neuter the project or see it shelved.

And I would cite "The Women's Room" as only one of a number of examples. "Miss Jane Pittman" falls into the same category. "Gideon's Trumpet," "Playing for Time." I am particularly experienced in the movies for television form because my company does most of its business in that form. Parenthetically, I can add that Mr. Fowler's so-called compromise which, as Mel suggests, is not a compromise but really a thinly veiled catastrophe, glibly dismisses the TV movie and miniseries form as virtually insignificant. And yet last year, of 90-some television movies that were made, over 60 were done by independent companies.

The independents depend upon the movie and mini-series form, and the FCC seems destined to ignore that area.

The CHAIRMAN. I want to come back again, though. You take a show to CBS, and they say thank you, Mr. Hill, you have done some good shows in the past, but we do not want to do this one.

Does that mean you have no chance of going over to ABC and NBC and saying will you take a look at this, I think I can do something with it?

Mr. HILL. No, it does not.

The CHAIRMAN. So you are not automatically foreclosed if one network turns you down.

Mr. LEAR. Senator, may I answer that?

The CHAIRMAN. Yes, sir.

Mr. LEAR. You are not foreclosed. You are foreclosed to the extent that the chances are the three networks are looking for the same thing because of the competition I spoke of earlier. So if you have a show as I had in "Mary Hartman," that one network would not take, the other two did not take it, too. The same thing was true with "All in the Family." For 3½ years three networks turned it down until one network finally with new management said they might be interested.

The CHAIRMAN. Let me ask you something, Mr. Lear, because this is what I do not understand. The networks are the ones with their neck in the noose because of their licenses, and they are held responsible.

Mr. LEAR. I would like my neck in that noose.

The CHAIRMAN. They are the ones that are going to be held responsible for what they put on the air, whether they produce it themselves or buy it from you. They are the ones the public and eventually we are going to hold responsible, good or bad. Therefore, assuming that they run polls that indicate that they do not want the mustachioed Jews on television I cannot understand why they will buy a show from you that would have that kind of a character if they would not produce one themselves? Why would they do that if they think if this goes on the air, we are going to be in trouble? The public does not know how it is produced.

Mr. LEAR. Senator, the name of the game is what is on Tuesday night at 8 o'clock. If on network one, three young women on motorcycles is working, you will see four young women on motorcycles working on the next channel as quickly as they can get it. I mean, that is the nature of network television, because to have to win quickly, instantly, suggests immediately you do not take risks.

The CHAIRMAN. Well, then, why are they going to take a risk? If they want young women on motorcycles, why are they going to take a risk if you come to them with a show that is totally different and they say we want women on motorcycles?

Mr. LEAR. Well, they very often do not. "All in the Family" took several years. "Mary Tyler Moore" took several years to get going, and "Mary Hartman" I could never get on a network. I have not been able to get a black soap opera on three networks in 7 years.

The CHAIRMAN. But that is what I am getting at. If they are not going to take that risk, why are they possibly going to take it if you produce the show but they would not take the risk if they produced the show?

Mr. BLUMENTHAL. May I help here, Senator, because we have some examples.

Part of the dynamic that works in terms of the independence that some of us have achieved and Len is on his way to achieving that relates to these rules gives us as an independent company, we at MTM—and I know Norman's company—has given us some clout over the period of years. When a network comes to us, because all development does not generate from our company to the network—oftentimes they will come to us, for example, if they think four ladies on a motorcycle is an interesting concept, they will bring it to us. Now, because we have attained some independence and resources to back that independence up, in a lot of cases we turn network ideas down, ideas that they give us.

I know Norman and his people probably do the same thing because they are not shows that Norman wants to be involved in or that we want to be involved in.

Now, when we have a show that is somewhat innovative, and as Norman has, and he wants to do, because the network wants to do business with us, and because we have been able to back up our independence with the resources that we have acquired, they want us on the network, they will in a lot of cases trust us to go forward on a project that they would never, ever think about doing and that they would resist, but because they want Norman to write and produce a new series and the only way he will do it is to do the particular show that he wants to do, they have to listen to that because he has attained that ability.

The CHAIRMAN. I see what you are saying. They are going to say for all of the evidence we have and all the research we have done, MTM and Lear do not have a bad track record, and maybe if they think something will work, we ought to give them the benefit of the doubt and try it because it has worked before.

Mr. LEAR. Yes, it is the clout that I spoke of. It is the battle that I urge this committee to keep alive, that battle between the creative entities which get together in companies such as MTM and Embassy's, and the networks. To centralize more control in the hands of the three networks is to diminish the effect of these independent entities that provide the creative impetus in television.

The CHAIRMAN. Thank you. My time is up.

I will have some more questions in a bit, but I will wait until Senator Goldwater is done.

Senator GOLDWATER. I have just one question, and I would like each of you to comment on it if you would care to.

In yesterday's business page, or the day before, there was a story that the networks and you all were going to get together and negotiate. Now, from what I have heard so far, you do not have a whole lot to negotiate with.

Am I right or wrong?

Mr. VALENTI. Senator, I will try to begin answering, and I think Mr. Burch may want to follow on this. The only reason why I am going to answer your question in a circuitous way is because there is no "yes" or "no." The only reason the networks would sit down and talk is because they perceive for the first time that their avalanche has been halted and that both the Senate and the House, by votes, whether you like them or not, have made it clear that this Congress by some kind of majority vote is not pleased with what is happening in this great public policy area of television.

So now they are ready to sit down. They thought they had the ballgame won. I am now talking about the real world we live in. That is why this negotiation is taking place. As long as they believe that Chairman Fowler is still their champion and they might be able to squeeze out three votes in the FCC, as long as they believe that this Congress is not going to intervene before that vote is taken, we do not have anything to negotiate because they have got it all running on their side.

In this compromise, in any negotiation, we have got to give up something. They are going to take, and we are going to give. That is the way the negotiation is going to go.

So I find us in a very difficult situation. The networks, if they want to impede this and put up barriers, can drag it on and drag it on. Then they would say "these guys do not want to talk, and therefore, Mr. Fowler, you go ahead and pass your rule."

We are going to sit down in good faith. We are going to try to come to some fair and reasonable solution which will allow Mr. Hill to be an independent businessman and which will not allow the networks to command these airwaves totally.

Now, somewhere in between what Mr. Fowler has suggested and what the rule is now, we are going to try to structure something that you would find and Senator Packwood would find equitable and fair and reasonable, though equity may be seen differently through somebody else's prism.

We are going to try as best we can to be fair. I will tell you this, Senator. We do not want to turn this programing area over to the networks. We are just not going to do it. They are going to have to run over us in Congress and run over us in the FCC.

Senator GOLDWATER. Let me add another one here after listening to you. You really do not have much to negotiate with, do you?

Mr. BLUMENTHAL. I do not think anything that we negotiate with, obviously we are going to have to give to the network. I mean, there is nothing.

Let me just relate to you—and I do not know if this is the point. I deal in the business area of this business every day, and I know Norman has made the suggestion and has probably tried the negotiation himself, but we constantly hear, and I think we hear in the hearings that the networks say they want to be our partners. We have approached networks, I mean in terms of individual deals, and addressing that issue and say, OK, if you want to be a partner as opposed to just taking everything from us, let's have a true partnership, a fair partnership, where you would throw in your advertising revenue and we would throw in the syndication revenue and divide that up. That to me, if they are truly talking about a partnership, that would be some kind of a fair approach to a partnership. They will not discuss that issue.

I get doors slammed on me when I bring that up. I know Norman's people have done that every once in a while. I can imagine the conversation does not last too long. But that to me is a fair approach.

Now, if there are other approaches, I guess we would have to hear them, and we will listen to them. But I do not know what more we would do except give up things to them.

Senator GOLDWATER. Mr. Burch?

Mr. BURCH. Mr. Chairman, in the comments that were filed at the FCC on September 20 of this year, the independent television stations postulated what I think could be considered a compromise. Until about 4 or 5 days ago we never had any response to that compromise. The terms of it are fairly simply laid out. It would grant the networks some financial interest, keep them out of the syndication business. Whether or not any kind of an agreement can be struck that would satisfy not only the parties but the Congress, the Department of Justice and the FCC, I suspect remains to be seen.

Ms. MOORE. The negotiation to me suggests an imbalance in which the network is suffering, and they are not. We are suffering. The only time we make money is in syndication. You heard the figures from Mr. Blumenthal about what it costs to produce an episode of "Hill Street Blues" and how much money we are given by the network, and there is a huge discrepancy there. They are making millions of dollars in their initial advertising revenues.

Mr. HILL. That point should be underlined. The networks are in a no-risk business. If we produce a pilot for them and it does not get ordered to series, we can lose our pants. The network is able to sell plenty of advertising and at least recoup its development costs. In 1982, the third place network in a three-place race made $107 million.

The public interest is not served by securing the inalienable rights of the RCA stockholders to make a profit from NBC. Should NBC be so mismanaged that it is voted out or a new company buys it, so be it, but what is good for NBC is not necessarily good for the country. It is important that the market force be allowed to put RCA in a position to determine if NBC maybe should be sold, maybe it should have new management, but to protect the inalienable right of networks to profit is a rather curious argument, and Mr. Tinker's efforts to advance that argument is, while articulate, finally illogical.

Mr. VALENTI. Senator Packwood and Senator Goldwater, that brings us full circle. In my determination to try to meet your red light, I left out one sentence. Why, oh, why are we here? Why are we having these hearings? Why does the FCC make this decision? What is there in the public interest that stirs this thing? The people that you have heard are all people who are theoreticians and have never dealt with this business. Why did we get into this business in the first place of trying to unleash networks? Do they not have enough power now? Are they not making enough money? They are in everything. Why are we here?

And so now we are forced into a negotiation simply in order to keep us from being hanged. When a man is about to be hanged, it does concentrate the mind wonderfully. So we are now trying to negotiate something.

But why are we here?

Senator GOLDWATER. Well, we want to cut the rope before they hang you.

The reason I asked that question is that I read there were going to be negotiations. I do not know whether you have agreed to it. I do not know whether the networks have agreed to it. But if I were going to negotiate a case like this, it reminds me of a poker game. I

have got a pair, and I know that the guy across from me has got a full house. In that case, you do not negotiate.

Mr. VALENTI. I just want a new deck of cards. Mr. Chairman.

That is why we are coming to you, for a new deck of cards.

Senator GOLDWATER. Well, we want to help. My own personal feeling is that because we created this monster back in 1952 and before that, even, then the legislature, whether we like it or not, is going to have to have a hand in straightening it out.

Now, I was merely asking that question based on an ex-businessman's interest in the possibility of a solution. You would not benefit in advertising?

Mr. VALENTI. No, sir.

Senator GOLDWATER. You would not benefit in any indirect profits paid from, let's say, Ms. Moore and Mr. Blumenthal's production?

Mr. VALENTI. The only time you benefit, as Mary Tyler Moore said, is when you go to syndication. Networks make money on dead pilots. As Mr. Hill said, unless you are in the business, this all seems rather bizarre to people. They cannot believe this happens. But Mr. Blumenthal and Ms. Moore in their company are gambling. They are putting up millions of dollars in "Hill Street Blues," for example, that it is going to be so popular with the people. They are putting in quality writers and directors and actors. If "Hill Street Blues" can stay on the network for at least 4 years and the producers can have 80 to 100 episodes, then they can strip, they can do all the sort of things which we call "the syndication market." That is where the producers have a chance. But only one out of 36 pilots ever gets to syndication.

Mr. Hill can tell you of the times he has gone under. He is an independent businessman. He is dealing with people who control the business.

For example, if there were only three book publishers in the country and you had to go to them, you would be in trouble. But if I want to publish a book, Senator, and every publishing house in the country turns me down, I can do what President Nixon just did, I can print my own book and I can send it out to people and to the bookstores, and if it works, then I have got a hit. If I want to make a movie and every movie studio in the world turns me down, I can make my own movie. I can take my movie to theaters who are unaffiliated with anybody, any studio. I can go directly to the marketplace.

Those alternatives are barred to me in prime time television. There are no alternatives. Unless that fact is understood, then we cannot have any kind of a dialog.

Senator GOLDWATER. Then you have not agreed to sit down and negotiate?

Mr. VALENTI. Yes, sir, we have. We have done this, Senator, simply because a number of significant and influential forces in the Congress have suggested to us that we ought to.

Mr. LEAR. We could be talked out of it instantly.

Mr. VALENTI. I am living now in the real world again, Senator.

Senator GOLDWATER. I am not trying to talk you out of it. I just wonder why the hell you are doing it.

Mr. VALENTI. Well, we are doing it because of the rude forces of politics, sir, to be perfectly honest. I have been around long enough to know that I know a rude force in politics when I meet up with one.

I live in that world. I am willing to play in that game. But I know that the alternatives are bleak.

Senator GOLDWATER. I see the red light.

Mr. VALENTI. Which I have ignored. I am sorry, sir.

Senator GOLDWATER. That is perfectly all right. If you ever find a publisher, let me know.

Senator Wilson might have a few questions.

Senator WILSON. I would be happy to yield my time to the chairman. I think the testimony has been excellent, and the questions I had really have been answered by the testimony.

The CHAIRMAN. Jack, tell me what it is you said just before the last comment about the three networks. Would you said it again?

Mr. VALENTI. I am saying to you, sir, that independent television stations, there are 179 of them, are in 84 markets. If you are a national advertiser, Procter & Gamble, General Mills, whatever, you want to have a national advertising campaign. You must be in 100 percent of the markets. You cannot be in 84; you are missing some of the markets and have to use spot television which is higher, in costs et cetera. So you go on the networks because there are only three ways you can reach 100 percent of the market. That is the three networks.

Now, if they turn you down, if you are a programer, you are out of business on a national prime time. I am pointing out there is no alternative publisher. There is no alternative way to get to the marketplace. Norman Lear, Mel Blumenthal, and Mary Tyler Moore can tell you they have tried. There have been alternative ways to get a fourth network that have all collapsed from exhaustion because it does not exist.

The CHAIRMAN. Tell me, Jack, what is this "Operation Prime Time" that is going to be showing "Sadat" in about 100 markets?

Mr. VALENTI. "Operation Prime Time" is a consortium of producers and independent stations who get together because the networks do not want that film. They are going to try to syndicate it, as it were, to go locally. But I do not know how many marketplaces it is in, but I would day say, Norman and Mel, there may be in 65, 70 percent of the markets. So you have got to scratch around for advertising. You do not see much of "Sadat" or "Golda Meir" or some of these syndications. "Mary Hartman, Mary Hartman" tried to go that route with Norman Lear, a first class show, but the networks turned him down and he had to scrounge around in the marketplace to find some niche. You can only do that just every now and then because you have to preempt affiliate time in order to put together any kind of an ad hoc network.

The CHAIRMAN. Well, apparently "Golda" went that same route, did it not?

Mr. VALENTI. Yes.

The CHAIRMAN. Now, apparently they are successful at least. It is being shown on a network affiliate in Baltimore, and it is being shown on an independent here. Apparently there is another alternative to going to the networks.

Mr. BURCH. Senator Packwood, lest Jack denigrate the independents too much, let me say that Operation Prime Time is what is known as first-run syndication, or an ad hoc network, whichever you prefer, and it consists of somebody who is willing to put up the money to produce a show, and then try to make an ad hoc network out of mostly independents, but in some instances, a few affiliates who will clear the program if it is of sufficient moment.

The fact is it cannot be done on a regular basis. The affiliates will not clear, the money does not exist to in effect create a fourth network.

The CHAIRMAN. When this does happen, do you know who gets the syndication rights?

Mr. BURCH. The producer of that show would get the syndication rights. First of all, that is not a typical syndication. It is what is called a first-run syndication.

The CHAIRMAN. I understand it is first run, but if it is going to be rerun later, can the independent network, this consortium, have syndication rights?

Mr. BURCH. I suppose that some sort of a negotiation could happen, but the fact is that the syndication rights are in the producer of the show.

The CHAIRMAN. They are not precluded? That is what I mean.

Mr. BURCH. No; not under a rule.

The CHAIRMAN. That is what I mean. And so by bargaining at arms' length, they can choose to.

Mr. BURCH. Well, it would be hard to find out who to bargain with because the so-called fourth network varies from program to program. It is not always the same people.

The CHAIRMAN. I understand.

Jack, when you were in my office with the others, there was occasionly some quarrel about the facts.

Did I misstate the Committee for Prudent Deregulation's facts as I quoted them from the FCC document?

Mr. VALENTI. I do not know that you misquoted them, Senator, but I wanted to give you what the facts are. The facts are that the 1983-84 season Daily Variety, which is an objective source from either CBS or the Committee for Prudent Deregulation, shows 96 production companies that had network committed pilots, made for TV films, short flight series, mid-season replacements, new series and mini-series committed for 1983-84. I have their names. There are 96 of them. Now, by whatever method Mr. Fowler is using, that is certainly a lot more than existed before.

The CHAIRMAN. His figures were not his, they were yours. They are the Committee for Prudent Deregulation's figures.

Have I quoted them right?

Mr. BLUMENTHAL. Senator, might I make a statement because I think those particular figures have been a bone of contention in terms of how they were compiled.

It is my understanding that those figures are basically a snapshot of 1 week of prime time television. It was not a survey over a cross section of a number of weeks.

How the particular week—and I do not even know what the week was—in what year, but it was 1 week of prime time television, as you are probably aware, during a week, programing is not

always the same. The same series are not on the air in a week. There are obviously movies coming in and out. Also, that calculation did not calculate and did not have any of the people that produced movies for television, the MOW's, the original ones, the production entities that produced those which Len, I think, mentioned in his testimony is substantially independent, those are not included. In addition, since the inception of these rules, the number of prime time hours has gone down, I think around 10 hours a week.

One big factor being prime time access was carved out, so that was a half hour that used to be network prime time programing prior to the rule. So that has been reduced. Monday night football——

The CHAIRMAN. Well, Jack and I deal with each other a lot, and I wanted to make certain that I did not misstate this because what I was quoting were allegedly the Committee for Prudent Deregulation's figures.

Mr. BLUMENTHAL. You did not misstate. That was, I think, in an economic study that was commissioned. We challenge it because unless you have all the information on what those figures are, they are totally meaningless.

The CHAIRMAN. All right, now, explain to me something about Coke and Gulf & Western. Are they not involved in production also?

Mr. VALENTI. I will speak to that. Paramount Pictures was purchased by Gulf & Western some 8 to 10 years ago. It is a subsidiary of Gulf & Western. About 8 or 9 months ago, Coca-Cola purchased Columbia Pictures, of which Columbia Pictures Television is a subsidiary of the parent company, Columbia Pictures Industries. To that extent, Coca-Cola owns Columbia Pictures Television. The answer is yes.

The CHAIRMAN. It owns them.

Mr. VALENTI. Yes.

The CHAIRMAN. And Gulf & Western owns Paramount.

Mr. VALENTI. Yes, sir.

The CHAIRMAN. And, I assume, controls them if they choose to.

Mr. VALENTI. Well, by whatever definition they own them. They have been very prudent in letting Rick Frank and Michael Eisner handle that business without any interference from the home office, and my judgment is Coca-Cola would do the same with the personnel of Columbia Pictures.

The CHAIRMAN. Well, I assume both Coke and Gulf & Western must do a fair amount of market research.

Mr. VALENTI. They do.

The CHAIRMAN. And I am curious now because I heard Mr. Lear indicate when he was in the office one day that the research done by the networks is—I do not know if you said bad research or research that reached the wrong conclusions. You used the example of the mustachioed Jew. Is Coke's kind of market research different than the networks if they are looking at what kind of ads to do and what kind of people to have in the ads, whether that will offend people and will not offend people?

Mr. LEAR. If I understand where your question is leading, sir, Coca-Cola and Gulf & Western, though they own those two companies as subsidiaries, have nothing to do with the day-to-day man-

agement of those companies as they turn out a television product, and if I do indeed understand where your question is leading, let me say that those companies, as large as they are, the name of the game for them is to develop that writer or that director, that show which the network will like. And so those companies put their faith in the people with whom they make arrangements, the independent television writer-director, and sometimes they come in as a full company, the director and the writer together.

Then those people go to the networks. So when I talk about commercial imperative and creative imperative, it is the network commercial imperative that rules and not Gulf & Western and not Paramount.

The CHAIRMAN. You mean it is the commercial imperative that rules the network?

Mr. LEAR. Yes, it is what they are looking for answers their question how do I win Tuesday night at 8 o'clock?

The CHAIRMAN. But that is going to be true whether they get the show from you or from Paramount which is owned by Gulf & Western, or from Columbia, which is owned by Coke, that same imperative.

Mr. LEAR. Absolutely, which is why we look to this committee and the Congress and the FCC to maintain the creative forces so that with sufficient power, with sufficient control so that they can engage in this battle.

The CHAIRMAN. Are Coke and Gulf & Western unable to compete head to head with the networks in terms of bargaining power?

Mr. BLUMENTHAL. I would like to say two things on that issue. One, Coke and Gulf & Western has no greater ability to negotiate with the network, if they want to be in the television business, than MTM or any other company. There are still only those three theaters to get in. If the network has the right to control and obtain rights, they will get it from Gulf & Western, they will get it from MCA, they will get it from MTM.

What to me is a more interesting fact of Gulf & Western and Coke being in this business is that an MTM, a Norman Lear and a Len Hill, because of these rules, can be competitive with Coke, MCA, and all the big conglomerates. The rules create in terms of the production business between production companies real competition because it keeps the networks somewhat in balance.

I have more shows on the air, and I think Norman does, than Gulf & Western do right now.

The CHAIRMAN. From the standpoint of the viewing public, is your bottom line position that they have received better shows since 1970 than they received before?

Mr. BLUMENTHAL. I think maybe I would like Norman to answer that. I have a feeling about it, but Norman I think spans more years. I think what we all refer to as the golden age of television—and this is a personal reaction now—is not so golden when you go back and look at what we saw. There were some wonderful things going on, but by today's standards, the audience and all of us I think would not be much impressed by the production.

I do not think that television, and I think most of us do not think television has anywhere near reached the kind of quality potential that it should have. Some of us struggle against great odds occa-

sionally to do something different, innovative, high quality, and also entertaining, because that is important, and it is a struggle to get a "Hill Street Blues" or a show that we premiered last week called "Bay City Blues." It is going to take a long time for that show, if ever, to attract an audience, to convince the network to keep it on because it is new and different.

The CHAIRMAN. Let me paraphrase your answer, if I can. We all have fond memories of Sid Caesar and the "Honeymooners," but what you are saying is those shows would not cut it today, much as we may remember them with fondness?

Mr. BLUMENTHAL. I think generally speaking, without getting into a specific show, I think that is my position.

Mr. LEAR. No, I think those shows were wonderful shows and great shows. They were made in an entirely different time. The competition for ratings was not the same 10 and 20 and even 5 years ago. When we all started in television, sir, the network brought in 39 shows and 13 repeats. That was the network order. Then it cut down to 24 and 22, 13, and now 6 and 4 a network.

I am going to do a new show for the first time in 3½ years. I am supposed to have this terrific reputation, and any network would want to do business with me. Nonsense. They want to do business with me if they like the idea, and then when they like the idea, the order is six not more then six, six. That is as good as I can do at this particular time.

So it is interesting to know that the shows to which you refer, "Sid Caesar" and the "Honeymooners" were also independently produced. They were not produced within a network system, but they were produced at a period of time——

The CHAIRMAN. Well, that was before the rule. They still used independents.

Mr. LEAR. Yes, before the rules and after the rules, the interesting thing to note for me is that independent, creative forces were the forces that delivered those shows. The rules become more and more necessary as the competition between three networks increases and the name of their game is only the commercial imperative. That is when for the public interest and the sake of the viewer and Mrs. Murphy and so forth you need a strong, creative entity, wherever they exist, California, New York, wherever that creative entity exists, in order to be equivalent in that battle.

The CHAIRMAN. Well, now I am confused. The commercial imperative was there in the 1950's, was it not? They still had to make money.

Mr. BLUMENTHAL. But Senator, we were selling to advertisers. That was the buffer in those days between the network power and the production company. We were selling to a large number of advertisers, not to networks. The advertisers were then, if they wanted our show, or—well, we were not in existence then, but whatever the MTM was at that time, would then, when it had a show and it financed the pilot and produced and put up the money to produce the series, would then go buy advertising time on the network and place the show. The network was basically a common carrier I think you would probably call it in those days, but that was the buffer to the network power in those days.

Mr. HILL. Senator, there is a fundamental problem in these statistical analyses that are often run through economists' computers. The television business in the 1950's was in its infancy. It cannot be compared to the television business in the 1980's. So to take statistics from 1960 and hold them up against 1984 and try to determine on the basis of some precedent how the network would behave is to build an argument out of hay.

I think there is one fundamental argument that this August body can understand. All we are arguing for is a separation of powers. The networks do a terrific service of being broadcasters and providing free, commercially supported entertainment. They should be broadcasters. They should not be producers. They should not own syndication. Let the network become broadcasters, let producers remain producers, and let that flint, the spark, the struggle that Norman refers to, between them be that which ignites creativity.

The CHAIRMAN. Thank you, Mr. Chairman.

Senator GOLDWATER. Well, thank you, gentlemen and Ms. Moore, very much.

Ms. MOORE. Just one thing, Senator, before we close. I want to thank everybody for what I think is going to be the hit of next season, Mrs. Murphy and her pack of three girls on motorcycles.

Senator GOLDWATER. The next panel and the last panel of the day will be Mr. William Lilley III, vice president of corporate affairs, CBS; Mr. Everett Erlick, executive vice president and general counsel, ABC; Mr. Robert Mulholland, president and chief operating officer of NBC.

You may sit in any order you wish.

Unless you have a preference, gentlemen, we will start with Mr. Mulholland. If you have a prepared statement, we will print it in the record as if given, and if you will just proceed, paying a little attention to the lights.

Mr. Mulholland?

STATEMENTS OF ROBERT MULHOLLAND, PRESIDENT AND CHIEF OPERATING OFFICER, NATIONAL BROADCASTING COMPANY, INC.; EVERETT H. ERLICK, EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL, AMERICAN BROADCASTING COMPANIES, INC.; AND WILLIAM LILLEY III, VICE PRESIDENT OF CORPORATE AFFAIRS, CENTRAL BROADCASTING SERVICE, INC.

Mr. MULHOLLAND. Mr. Chairman, my name is Robert Mulholland. I am the president and chief operating officer of the National Broadcasting Co. I am here today to present NBC's strong opposition to S. 1707. I would like to concentrate on urgency, the urgency for repeal now and why we feel there is such urgency.

S. 1707 would force the FCC to ignore the enormous changes that have taken place in the television industry since 1970. These changes make repeal or modification of the rules an urgent matter for free television audiences, and that includes Mrs. Murphy who we have heard so much about this morning.

I would like to review a few basic facts. In 1970, the average television household could choose among seven television signals. Today it can choose among 12. In 1970 there were 90 independent

television stations in the Nation. Today there are 179. In 1970 there were 4½ million basic cable subscriptions. Today there are 32 million. That is almost 40 percent of television homes, and the number increases every minute. In 1970 there were no, repeat, no pay cable subscriptions. Today there are more than 20 million, and that number increases every minute. In 1970 there were no basic cable or pay cable networks. Today there are 34 basic cable networks and 17 pay cable networks.

The people who sat here this morning and said there are only three networks are wrong. There are 34 basic cable networks and 17 pay cable networks. They all compete with NBC, CBS, and ABC, who I might add, compete vigorously among themselves as well. They all compete for audience, and some of the larger pay cable networks compete with us for programing. And none, none of the new networks is regulated.

To quote a senior executive from Home Box Office, the largest and most successful of the new pay networks, "It is inevitable that cable will be the predominant distribution vehicle in the country. We may have 6 more years of network television, but no more."

Now, I do not agree with that prediction of our total demise. However, there is no doubt the video revolution is well under way now in the United States. Pay already outbids free, over-the-air networks for Hollywood movies. Sports events are moving to pay in increasing numbers. There was another announcement this morning in the business pages of the Washington Post I would refer you to. All entertainment programing, both weekly entertainment series and one-time specials, are starting to flow from free, over-the-air television to pay.

The rules accelerate this transfer of programing. How? By restricting the rights free networks can acquire. This limits the amount free networks can pay for programing. No such restrictions apply to the pay media. Because the pay systems can acquire more rights in hopes of recovering more of their investment, they can pay more to begin with. NBC cannot. The Government will not allow us to.

The rules also limit the ability of free networks to invest in promising new program producers. This limits diversity. The rules force new producers to turn to the major studios for financing. This limits diversity. The rules protect Hollywood studios from potential new competitors. This limits diversity.

So with the major studios and large producers firmly in control of program supply, the free networks are essentially limited to buying from existing production outlets. And ultimately, the public loses two ways. First, there is less diversity in programing on free television, and second, the migration of quality programing to pay is speeded up. And those who cannot afford the pay services, such as the lower-income Americans and the retired, will be left out.

The Government should not favor pay television over free television. Yet that is what these rules do. And that is why there is urgency, the word I used to start with. If these rules were repealed by the FCC today, none of the free networks would receive 1 cent from possible syndication revenue until 1988 at the earliest. This is because there is a 5-year course a program must travel before it returns a single penny from syndication—from idea to script to pilot

to broadcast to successful life on a network long enough so that enough episodes can actually be produced for syndication sale. Only then can syndication income be realized.

Passage of S. 1707 would add at least another 5 years of delay. This bill would force the commission to do nothing at a time when dynamic changes are transforming the telecommunications industry. We feel very strongly the FCC must be able to respond to these changes. To create a regulatory vacuum is not in the public interest.

For these reasons, NBC strongly opposes S. 1707. We feel it is not a good bill and that it should not be adopted.

Thank you.

[The statement follows:]

STATEMENT OF ROBERT MULHOLLAND, PRESIDENT AND CHIEF OPERATING OFFICER, NATIONAL BROADCASTING COMPANY

My name is Robert Mulholland, and I am President and Chief Operating Officer, of the National Broadcasting Company. I am here today to present NBC's strong opposition to S. 1707.

The Bill would prohibit the Federal Communications Commission from taking any action on its own Financial Interest and Syndication Rules for five years. Passage would effectively overrule the conclusions of the expert agency charged with regulating the telecommunications industry. It would also overrule the views of every other Government agency that has reviewed the Rules—the Justice Department, the Commerce Department and the Bureaus of Consumer Protection, Economics, and Competition of the Federal Trade Commission. All have advocated changes in the current Rules.

The FCC, after 6½ years of investigation and analysis, has concluded that the current Financial Interest and Syndication Rules do not promote competition, diversity or efficiency in the program supply market. In fact, after reviewing comments from all interested parties and experts, the Commission found that the Rules work against their stated purpose and disserve the public interest. According to the FCC, the Rules reduce competition among program suppliers and reduce the ability of broadcast networks to acquire attractive programs for the free television system.

S. 1707 must be seen, therefore, as inherently unsound in preventing the FCC from acting to modify regulations so clearly adverse to the public interest.

Beyond this, the bill would also force the FCC to ignore the enormous changes in the television industry since 1970. These changes make repeal or modification of the Rules an urgent matter for free television audiences. Let's review just a few simple facts:

The average TV household received 7 television signals in 1970. In 1983, it received nearly 12.

There were 4.5 million basic cable subscriptions in 1970. In 1983, there were more than 32 million.

There were no pay cable subscriptions in 1970. In 1983, there were more than 20 million.

There were 90 independent television stations in 1970. In 1983, there were 179.

There were no basic cable or pay cable networks in 1970. In 1983, there were 34 basic cable networks and 17 pay cable networks, according to the FCC.

These alternative media compete increasingly with the networks for all types of programing—sports, movies and entertainment. In that competition, the pay system's buying power is great because it is subscriber based. That means pay's smaller audiences can generate equal or greater revenues than the larger free television audiences. As a result, series programs and specials are being made for the pay media by the same organizations that produce for the broadcast networks. Lorimar is one example; Embassy, Hanna-Barbera, and 20th Century-Fox are others. Today, every major program supplier is developing entertainment programing for cable and pay cable—and that includes sitcoms, musical specials, dramatic series and made-for-pay movies. One HBO executive predicts: "It is inevitable that cable will be the predominant distribution vehicle in the country. We may have six more years of network television, but no more than that." We don't agree—but pay competition for programing is here now.

As to movies, pay already outbids the free networks for the studios' first-run theatricals. In the words of one studio head: "In a real sense, every movie that is being made today is being made for pay cable."

As to sports, a similar pattern is developing. Major championship boxing matches are on pay. So are Davis Cup tennis, Stanley Cup hockey, and some important college football and basketball games. More and more Major League Baseball games that used to be seen on free television stations are now seen only on pay TV.

How do the Rules accelerate the transfer of popular programing from free television to pay television? by restricting the rights networks can acquire, the rules restrict the amounts each network can pay for programing--the amounts it can risk in program development. No such restrictions apply to the pay media, who can acquire rights and profit shares for all the video markets. Because the pay systems can get more, they can bid more.

By limiting the amount networks can risk in program development, the Rules also limit the ability of networks to invest in the promising ideas of new program producers. In this way, the Rules force new producers, who need a great deal of investment capital, to turn to the major studios for financing. Thus, new producers must join together with their competitors, the studios and large production companies, in order to get their programs produced. This prevents the formation of new independent sources of supply and protects the Hollywood studios from potential new competitors.

With the major studios and large producers firmly in control of program supply, the networks are essentially limited to buying from existing production outlets. This is particularly onerous because many studios are developing programing specifically for pay or have joint ventures with pay systems.

Ultimately, the public loses as better programing goes to those who can afford the pay services.

It is obvious then why so many low income, senior citizens, and minority groups, public interest and consumer organizations, religious groups and labor unions support repeal of the Rules. We would be happy to provide each member of the Comittee with a list of these organizations.

Their members are concerned that the Rules give an unfair advantage to pay media in the acquisition of TV programing—to the detriment of viewers who depend on free television. They believe the Government should not favor pay over free television.

Yet that is what the Rules do—and that is what this bill would do.

What arguments, then, do our opponents offer in support of these Rules? Their arguments consist of three baseless fears: that repeal would allow the networks to get virtually "all of the profits" from syndication; that repeal would allow the networks to "warehouse"—or withhold—programs from the syndication market; and that repeal would give the networks excessive control over program content.

The first fear, that networks would take all the profits from syndication, is simply an Alice-in-Wonderland fantasy. It is inconsistent with the findings of every Government agency examining the Rules. Companies like, Coca-Cola's Columbia, Gulf & Western's Paramount, MCA's Universal, Warner Communications' Warner Brothers and Norman Lear's Embassy will not simply give up syndication rights or profit shares without due compensation and they hardly need the Government to protect them at the bargaining table.

The second fear is that the three networks—who compete fiercely against each other for programs, for talent, and for affiliates—would somehow conspire together to withhold syndicated programs from independent stations. This incredible scenario has been fully addressed by the Commission's Tentative Decision. If adopted, the proposed rule would totally ban each of the networks from domestic syndication of its primetime series. It would also require each network to transfer any syndication rights in those series to a third party six months after the program left the network schedule or five years after the start of network exhibition, whichever is sooner. The network would have no further control over the distribution of the program.

As to the third fear, that repeal will giver the networks excessive control over program content, this argument misrepresents the respective responsibilities of suppliers and networks.

The networks, not suppliers, are held responsible for the programs they air. If viewers don't life what they see on NBC they come to me, not Jack Valenti. Each network has always exercised that responsibility—before the Rules were enacted and while they have been in effect. Whether the Rules are repealed or not, each network and its broadcast standards department will continue to work with suppliers and will continue to have the right of approval over program content.

Obviously, it will always be in the interests of both the networks and its suppliers to seek the best possible programing for network viewing. That is why NBC and its suppliers have stuck with such highly acclaimed programs as Hill Street Blues, St. Elsewhere, and Cheers.

A final word about urgency. By 1986, it is expected that subscriber payments for pay cable services will exceed the total revenues of the three broadcast networks combined—and the differential will increase as the decade continues. The purchasing power of networks relative to pay will continue to decline. And yet, even if these Rules were repealed today, none of the free networks would receive any share of series syndication profits until 1988 at the earliest. This is because a series development project must go through script and pilot stages before actual episodes can be produced. A newly acquired series project could not be entered in the network schedule until at least next September. It then takes about 4 years to develop sufficient episodes for the syndication market. Thus, after waiting nearly 7 years for the Commission to complete its study of these Rules, the networks will see no share of series syndication profits for at least another five years.

Passage of this bill would add yet another five years to the delay and would prevent any of the networks from sharing in syndication profits until the mid 1990's, at the earliest. The Bill would force the Commission to a freeze at a time when dynamic changes are overtaking the telecommunications industry. To prevent the FCC from responding for so many years to these volatile changes is to create a regulatory vacuum that will disserve the public interest.

For these reasons, S. 1707 is not a good bill and should not be adopted.

Thank you,

Senator GOLDWATER. Thank you very much, Mr. Mulholland.

Now, Mr. Erlick, you may have your little say.

Mr. ERLICK. Mr. Chairman and Mr. Chairman, thank you very much.

I am executive vice president and general counsel of American Broadcasting Co., Inc., and we appreciate the opportunity to express our views.

Mr. Chairman, our statement obviously is going in the record in full, and since we have been struck this morning by everything from Mrs. Murphy to a letter from the White House, I would beg your indulgence to depart from my statement, to attempt to answer a few points that have been made by the other gentlemen who just preceded us, and since there are only three of us here, I would beg your indulgence if I perhaps exceed 5 minutes by a couple of minutes.

Thank you, sir.

First of all, Mr. Len Hill, very eloquent, very capable, attractive young man. A brief background for the committee's information. In 1977, Mr. Hill joined ABC. In 1979 he renegotiated his agreement with ABC, both as to compensation and bonus. That agreement provided, among other things, that two Movies of the Week for television would be produced through his company, on the back end of his commitment, so to speak, and that if we did not produce those pictures, there would be a $200,000 per movie buyout obligation by ABC to his company, plus an executive producer's fee to Mr. Hill.

In 1980, September of 1980, ABC voluntarily released Mr. Hill from its employ and allowed him to enter independent production, and I venture to say had it not been for the ABC commitment and the two backend movie commitments which amounted to well over $400,000, Mr. Hill would not have been in business as an independent producer.

And I would simply submit for the record later, Mr. Chairman, a Variety article which is dated August 14, 1980, in which Mr. Hill

expressed his strong appreciation to ABC entertainment President Tony Thomopoulos and Senior Vice President Brandon Stoddard for being supportive in allowing him to leave for the independent field.

Senator GOLDWATER. That will be made a part of the record.[1]

Mr. ERLICK. I think that puts Mr. Hill in perspective for the committee, sir.

Second, there has been a lot of comment that independent producers were somehow victimized and bulldozed and tread upon in all sorts of horrible ways by the networks. Let me just give you a few examples of what happened before these rules went into effect. Six shows come to mind, two from each network, which were independently produced, which were financed by the networks, and which were quite successful. They were "Ben Casey" and "The Fugitive" on ABC; they were "Perry Mason" and "Gunsmoke" on CBS; and they were "Bonanza" and "Little House on the Prairie" on NBC.

Now, it may be that those producers felt that somehow their rights were infringed upon and that they were treated horribly, but strangely enough, they came back to produce other shows for the network. Strangely enough, they wanted to continue to deal with us.

Had we been so unfair and so unscruplous and so all grasping, is it not strange that these independents would have wanted to come back and continue to deal with the networks on what were then reasonably good terms for everyone?

Now, Mary Tyler Moore Productions is an interesting situation, which Mr. Mulholland may know more about than I do. But I would just like to remind the committee of some figures which they used when they testified before the FCC as to the financial risks involved on both sides of the equation.

By year 5, according to the figures they submitted, NBC will have invested a total of $82,500,000 in "Hill Street Blues." And the first year or year and a half, as Bob can probably tell you, were not successful. Mary Tyler Moore Productions, according to their own figures will have invested at that 5-year point $8,200,000 in the production.

I have an article here which I will shortly submit for the record, and it is headed "No Syndie Blues for 'Hill Street'." And it says "$30 million gross is achieved in just four markets." Four markets. That would mean to me that the national syndication value of this program could be approximately $150 million, on that order.

Therefore, for Mary Tyler Moore Productions to say they are hurting when they will have invested $8 million and they can see a syndication market of in excess of $150 million, boy, that is some hurt.

I think that we also have to put that into perspective. Now, NBC under these rules with an investment of $82 million, will not have been permitted even the opportunity to negotiate for any of that after-network market revenue. That is the essential unfairness of this situation.

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[1] The attachments were not reproducible and have been retained in the committee files.

Now, a word about warehousing. Warehousing is a myth that has been successfully created and very skillfully created by the independent stations to develop a protective mechanism whereby they would be shielded from any competition of their use of off-network syndicated programing. I do not blame them. I think it was an ingenious argument.

But I think we have to recognize certain facts. One, no one in any record in the years preceding this hearing today has ever come forward with one instance of network warehousing, not one. In the entire FCC investigative staff 600-page record which you are shortly going to have a copy of and in which they went into this in great detail, you will not find one scintilla of fact to support that argument.

Second, if we were to be so stupid as to engage in warehousing—in the first place, businessmen do not behave that way. You maximize your revenue. You do not put it on the shelf. A television program, unlike a good bottle of wine, does not improve with age, and one would minimize his revenue, not maximize it, by withholding it.

If we were to be so stupid and unbusinesslike, several things would happen at the same time. First of all, the Department of Justice would be on our doorstep the next morning, because the independent stations would be over at the Department complaining because the networks are withholding product from the marketplace to their detriment.

Second, we would have an FCC hearing.

Third, we would probably have one before you and Chairman Packwood.

And finally, the partners in the enterprise, because we would not be the only owner, would sue us before the night was over. We have an obligation, or would have, to our partners and participants in these ventures to deal fairly. That means you have got to sell to the highest bidder. That is the only course of action which a network company could take were it allowed to engage in this business.

A word about creative control, which has been here, there and yon throughout these many months of this proceeding. There is absolutely nothing, no effect whatsoever that these rules have on creative control, none whatsoever. The networks have a responsibility as station licensees and operators of a network, each with 200 or more affiliated stations, to be responsible in a responsible manner for the content of the programs which they broadcast.

Nothing is going to change that. You are not going to change that. You are not going to allow it to be changed. You want us to be responsible, or at least you have always indicated to me so, and so has Chairman Packwood and everybody else going back to John Pastore. You want the networks to be responsible.

So we have to exercise a certain measure of responsibility. That in fact is a shared control with the producers from whom we acquire these programs, and that is not going to change. It was that way before the rule, it was that way during the rule. And if we are fortunate and the results ultimately justify that decision, it will be that way after the rule.

And so I think that ought to be put aside, as it is simply a sardine or a red herring or whatever you want to call it. It has nothing to do with the issue before the House today.

Finally—and I will get to my statement and I will summarize it very shortly—there was a quote from Mr. Valenti from a U.S. Department of Justice stipulation which I would like to also submit with your permission, Mr. Chairman, for the record. What Mr. Valenti neglected, unfortunately, to read to the committee is the first portion of the second paragraph of the letter transmitting that stipulation.

This stipulation was, by the way, in order for ABC and the Department to avoid going through about half a carload of documents dealing with pricing and sales and that sort of thing. So in order to avoid all of that expense and time and trouble, the Government entered into a stipulation with ABC. The first portion of the second paragraph of the letter transmitting that stipulation reads as follows. And I will submit this letter for the record. This is from the U.S. Department of Justice to our outside counsel:

> This is to assure you that plaintiff, the United States Department of Justice, does not charge ABC in this action with agreeing, combining or conspiring with CBS or NBC or engaging in any form of tacit or explicit collusion with CBS or NBC or with violating the Sherman Act by engaging in any such agreement, combination, conspiracy or collusion with CBS or NBC.

That is a stipulation by the Department of Justice. I think that would clarify and equalize the quote which you already have in the record, which was somewhat out of context, as you can now understand.

Now, if I may, I would just like to briefly summarize my statement, Mr. Chairman. First, we oppose S. 1707 for two reasons:

First, we believe it is not sound public policy for Congress to legislate on a regulatory question prior to the time that the independent regulatory agency with appropriate jurisdiction has completed its deliberations. By prohibiting any change in the rule, in effect you would be prejudging the decision, which you will have ample opportunity to review, modify, or if you like revoke it, after it is issued. We do not think that is good policy.

Second, we oppose this bill because the present rules are anticompetitive. They constitute protectionism by the Government in favor of established producers and deny the public the benefits of free competition in the program supply market.

Networks and their affiliates face new competition, which Mr. Mulholland has expanded upon and which I will not burden the record with. It is attached to our statement. There is pay cable, cable, STV, MDS, DBS, LPTV, and a number of others—and let us not forget the expanding, continually expanding and prosperous independent stations, which are enormously successful in today's marketplace.

Existing producers do not need Government protection in their bargaining with the networks. They are major companies. In many cases they are parts of major conglomerates. Attached to my principal statement there you will find financial summaries of four of those companies, and I would just mention them briefly here.

They are as follows: Gulf & Western Industries, revenues $3.9 billion, income pretax $411 million; MCA, Inc.-Universal, revenues

$1,587 million, pretax income $273 million; the Coca-Cola Co.-Columbia Pictures, revenues $6,249 million, income pretax $932 million; and finally, Warner Communications Inc.—these are 1982 figures—revenues $3,989 million, income pretax $379.9 million. Hardly companies that you would say are unable to protect themselves at the bargaining table.

Now, the past record indicates—and again, this is part of the FCC record and it is available to this committee and it was the subject of my testimony before the FCC and it is undisputed—in the 20-year period preceding the adoption of these rules, when the networks were able to deal for and acquire syndication rights and financial interests, in not one single instance did ABC ever succeed in acquiring domestic syndication rights from a major producer. In not one single instance did CBS ever succeed in acquiring domestic syndication rights from a major producer.

The CHAIRMAN. What is a major producer?

Mr. ERLICK. Paramount, Columbia, Fox, MGM, Warner, and so forth.

The CHAIRMAN. But did you succeed with minor producers?

Mr. ERLICK. I will get to that. That is the second point. You are preceding me by one sentence, Mr. Chairman.

NBC in two or three instances I am told did succeed. Where we were successful in acquiring such rights, domestic syndication rights, was from independent producers, who had no syndication division to support and who had no studio organization to support.

Put simply, it was nonnegotiable with the major companies, and I predict it would be so again. So why Jack Valenti and his clients have to come in here asking for congressional protection and umbrellas over the heads of the Hollywood studios, now owned by conglomerates—from the normal ebb and flow of a true bargaining process—I do not know.

The Government, Mr. Chairman, does not belong at that bargaining table. These people do not need your protection. This is a private negotiation between private parties. There is no public interest involved here. We are talking about what one man can bargain for as opposed to another man.

Now, when we did obtain syndication rights and interests, despite the fact that you have heard figures as high as 80 or 90 or 100 percent that we would acquire, and all through our guerrilla-like tactics, the facts are quite different. The facts are attached to my statement and the facts show that the profit shares of the three networks averaged somewhere around 25 percent, and that the number of shows in which we did acquire syndication rights averaged somewhere around 25 percent. Hardly the 80 or 90 or 100 percent figures that have been bandied about purely as hyperbole and academically.

Now, we have a genuine need to be rid of this protectionist regulation, which benefits only the established producers and not the public. You have heard about the aggregate three-network share declining. I am not going to belabor that point, except to say this, and it can be illustrated very simply.

In the past 5 years since 1977, network profits as a percent of revenues have declined by 50 percent. There is a very simple reason for that. Audiences have been flattening out, costs have

been increasing faster than revenues, and the inevitable result is a profit squeeze. And that is the situation in which all three networks find themselves today.

Costs have gone up, program costs in prime time, approximately 15 percent per year since 1977. Revenues have gone up 9 percent per year since 1977. It takes no particular genius to realize where that is going to lead and where it is leading. And that is why we are here today, and that is why we do not think Congress should intervene in the orderly process of determination by independent regulatory agencies and those departments of the Government who have jurisdiction.

Now, if we are going to maintain quality and diversity, we have got to have the same opportunity to negotiate for profit participations that our principal competitors have. Attached to my statement you will find an article from the New York Times which spells out in two pages the programs that pay television is negotiating for—across the board competition to the networks today.

So it is not tomorrow we are talking about, it is today. We are talking about today. Also, in Tulsa, Okla., in a study you will see attached to my statement or I will submit for the record, we are not speaking about 1990, we are speaking about 1981. In Tulsa, Okla., one pay service, HBO, outrates today one of the networks in 36-channel homes.

So all this nonsense you hear about there being only three outlets and only three networks and so forth, you must read in light of what the facts are. The facts are attached to my statement. I hope that you will have an opportunity to review them in more detail.

Finally, I would say this. We all know that by the end of the decade pay cable and cable are going to be spending more money than the networks to acquire programing. We also know that, while ABC was able to acquire the rights to the summer Olympics in 1984, the second highest bid came not from another network, it came from a pay TV consortium. We are talking about the 1984 Olympics.

Therefore, it is the continued quality and diversity of the programing available for free over the air television which is now at issue.

And Mr. Chairman, in conclusion, I would ask you to consider these two questions: Is it really in the interest of the American public to disadvantage network television for the purpose of subsidizing companies like Gulf & Western, Coca-Cola, and MCA?

And two, does Congress really want to encourage a television access charge to the American public by driving the best programs from advertiser-supported television to pay television, and by creating a have and have-not television society in this country? I suggest not.

Thank you.

Senator GOLDWATER. Thank you.

[The statement follows:]

STATEMENT OF EVERETT H. ERLICK, EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL, AMERICAN BROADCASTING COMPANIES, INC.

Mr. Chairman and Members of the Subcommittee: I am Everett H. Erlick, Executive Vice President and General Counsel of American Broadcasting Companies, Inc.

Thank you for the opportunity to present ABC's views on S. 1707 and the FCC's Syndication and Financial Interest Rules.

ABC opposes S. 1707, for essentially two reasons:

First, we believe it is not sound public policy for Congress to legislate on a regulatory question prior to the time that the independent regulatory agency with appropriate jurisdiction—the FCC—has completed its deliberations. In this case the FCC has devoted years of study to the complete issues involved.

By prohibiting any changes in the Rules (even for a limited period), in effect you are pre-judging the FCC's final resolution, which none of us can know at this time. Indeed, you may find it to be an improvement over the status quo, which S. 1707 would preserve.

Second, we oppose this bill because the present Rules are antiquated and anti-competitive. They constitute protectionism by the government in favor of established producers, and deny the public the benefits of free competition in the program supply market. Moreover, because of the new competition which networks and their affiliates face from such emerging video alternatives as cable, pay cable, STV, MDS, DBS and low power TV—as well as expanding conventional television, the Rules undermine the quality and diversity of the program service which is available to the American viewing public without extra charge. The Departments of Justice and Commerce and the staffs of the FCC and the FTC have all urged that these Rules be repealed. No federal government agency or department recommends retention.

The Rules constitute economic protectionism in favor of the Hollywood movie studios and other major program producers because they preclude networks—which finance the programs from the outset—from even bargaining for a share in the syndication values of those programs after their network run. As a practical matter, this makes it difficult for networks to deal with new entrants in production. These potential independent competitors of the movie studios and other established producers need the financing flexibility to sell profit shares and syndication rights to networks who would then assume the full financial risk of production.

Existing producers do not need government protection in their bargaining with networks. They are major companies. In many instances, they are parts of large conglomerates. Attachment A to my statement shows the size of four of these companies. For example, The Coca-Cola Company, which owns Columbia Pictures, had 1982 revenues of $6.2 billion—more than twice those of ABC.

The past record indicates that if networks were permitted to bargain for syndication rights and interests they would not dominate these markets. For the twenty year period before the Rules, when a free market prevailed, networks almost never obtained the right to act as domestic syndicator from a major studio. When they did obtain that right in about one-fourth of all programs, it was mainly from independent producers with no syndication department and no major studio organization to support. By the end of that period, total three network sales in domestic syndication represented less than 10 percent of all domestic syndication sales—hardly a dominant position by any relevant yardstick.

While networks did obtain some interest in syndication profits in nearly two-third's of their pre-Rule programs, the share was rarely over 50 percent, and it averaged less than 25 percent.

Attachments B, C and D to my statement detail the foregoing points.

The networks have a genuine need to be rid of this protectionist regulation which benefits only established producers, and our need impacts directly upon the public. Networks face significant new competition from alternative delivery systems like cable and pay cable. The FCC's estimate of this new competition through 1990 is contained in Attachment E to my statement.

Knowledgeable observers predict that the aggregate three-network share of prime time viewing will fall to 64 percent or less by 1990 (see Attachment F). Research in the Tulsa, Oklahoma market shows that in households with 36-channel cable the three-network share is already only 56 percent. And while networks face static or declining audience shares, they incur program costs which have been rising at a higher rate than revenues, and will continue to rise in view of the burgoning competition for quality program. The obvious result is a profit squeeze, which has already resulted in three network combined profits as a percentage of revenues falling by 50 percent in just five years (see Attachments G and H).

There is no way the public can expect to continue to enjoy existing program quality and diversity in the face of these audience, revenue and cost trends. If program quality and diversity are to be maintained, we must have the same opportunity to negotiate for after-network market profit participations that our principal competitors have.

This conclusion is supported by the following illustrative facts:

Before the end of this decade, cable and the pay services will be spending more for programing than the three-network combined.

While ABC was able to acquire the rights to the 1984 summer Olympics, the second highest bid came not from another network but from cable/pay-TV interests. In entertainment programs, we are already facing across-the-board competition from HBO and Showtime.

Therefore, it is not just the financial viability of the three television networks and their 600-plus affiliates which is at stake. It is the continued quality and diversity of the programing available from free, over-the-air television which is now at issue. It is the public which will be disadvantaged if the premium programs which we offer, like Roots, Winds of War, the Olympics and other major sports, migrate to pay television.

I shall comment briefly on two other matters—what are sometimes referred to as the warehousing and creative control issues.

From the outset of the FCC's proceeding, the established producers, existing syndicators and others who find these Rules to be a useful shield against competition, have relied upon the argument that if networks could syndicate they would discriminate against independent stations—popularly known as "warehousing." ABC has stated repeatedly that we would not warehouse programs in any way, nor did we before the Rules. Indeed, warehousing would not only be wrong—it would make no business sense whatsoever. ABC has invited the FCC to regulate specifically against such a practice and the FCC's tentative decision is responsive to that concern. The Justice Department has said the FCC's proposed rule fully protects the legitimate interests of the independent stations.

The producers also claim that a change in the Rules would result in the networks exercising creative control over programs. The simple answer to this argument is that as the licensee of five television stations and the representative of 200-plus affiliated stations, each network has a responsibility to exercise an appropriate measure of control over the content of programs for its schedule. We must continue to exercise that responsibility, whether the Rules are changed or not.

Finally, I ask you to consider these two questions: (1) Is it really in the interest of the American public to disadvantage network television for the purpose of subsidizing companies like Gulf & Western, Coca Cola and MCA? (2) Does the Congress really want to encourage a television access charge to the American public by driving the best programs from advertiser-supported television to pay television?

ATTACHMENT A.—1982 REVENUES AND INCOME (PRE-TAX) OF SELECTED MOVIE STUDIO COMPANIES

Company	Revenues	Income (pre-tax)
Gulf & Western Industries, Inc. (Paramount Pictures) [1]	$3,992,601,000	$411,920,000
MCA, Inc. (Universal)	1,587,618,000	273,698,000
The Coca-Cola Co. (Columbia Pictures)	6,249,700,000	932,000,000
Warner Communications, Inc. (Warner Bros.)	3,989,985,000	379,900,000

[1] Fiscal year ended July 31, 1983.

ATTACHMENT B.—NETWORK SYNDICATION RIGHTS IN LICENSED ENTERTAINMENT SERIES

	No. of licensed entertainment hours (sample week)	Percentage of hours in which networks had domestic syndication rights
Year:		
1964	59¼	31.2
1965	65	25.4
1966	66¼	21.9
1967	63½	23.8
1968	67¼	23.0

ATTACHMENT C.—NETWORK SYNDICATION PROFIT SHARES IN LICENSED ENTERTAINMENT SERIES

	No. of licensed entertainment hours (sample week)	Percentage of hours in which networks had domestic syndication profit shares	Average domestic syndication profit share
Year:			
1964	59¼	65.8	22.2
1965	65	70.0	25.1
1966	66¼	70.2	25.2
1967	63½	65.4	23.1
1968	67¼	57.2	22.4

ATTACHMENT D.—THREE-NETWORK SHARE OF ALL SYNDICATION SALES TO U.S. COMMERCIAL TELEVISION STATIONS

	Percentage of sales
Year:	
1962	10
1963	7
1964	7
1965	7
1966	[illegible]
1967	8

Source: Arthur D. Little, Inc. Television Program Production, Procurement, Distribution and Scheduling (1969).

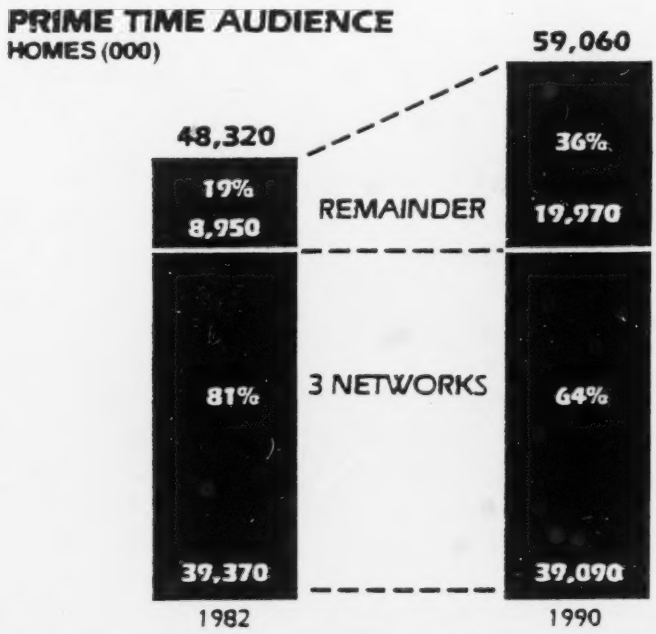
ATTACHMENT E.—AVAILABILITY OF VIDEO OPTIONS [1]

[In millions]

	1983	1990 estimate
Broadcast TV (TV HH's)	83	97
Cable TV (subscribers)	28	58
Pay Cable (subscribers)	23	45
STV (subscribers)	1.4	5
MDS (subscribers)	.5	3.2
SMATV (subscribers)	.15	.5–0.8
LPTV (TV HH's)		10
DBS (subscribers)		11
Multichannel MDS (subscribers)		6–12

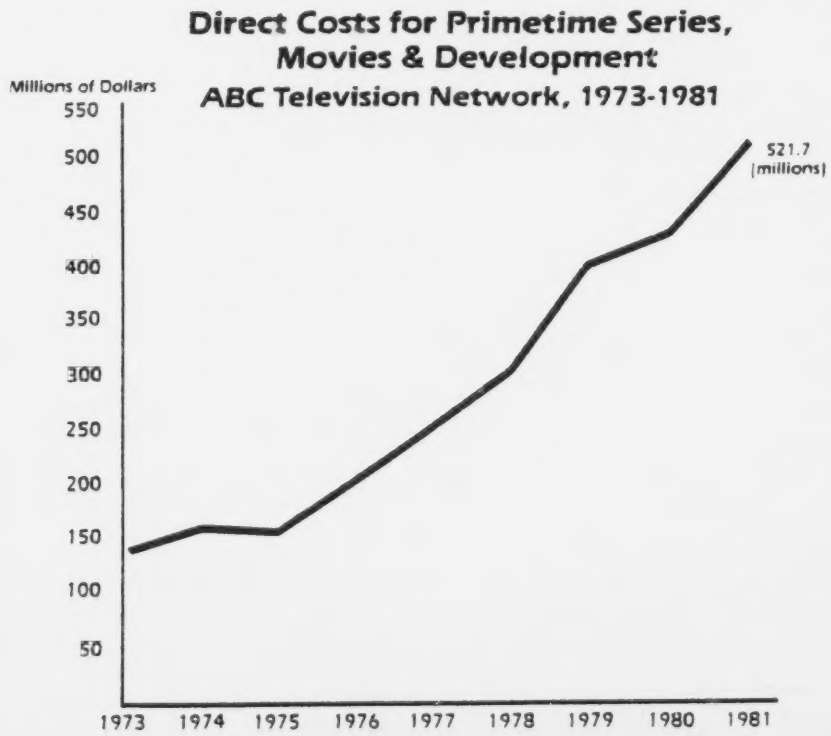
[1] Source: Amendment of Syndication and Financial Interest Rules, Tentative Decision and Request for Further Comments, 48 Fed. Reg. 38020, 38037 (Aug. 22, 1983).

ATTACHMENT F



SOURCE: AVG. OF J. WALTER THOMPSON, OGILVY & MATHER, ABC, CBS ESTIMATES

ATTACHMENT G



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ATTACHMENT H.—THREE-NETWORK COMBINED NET REVENUES AND INCOME

[Dollar amounts in millions]

	Net revenues	Income	Income as percent of net revenues
Year:			
1976	$2,118	$296	14
1977	2,581	406	16
1978	2,965	374	13
1979	3,455	370	11
1980	3,865	326	8
1981 (estimate)	4,237	335	8

Source: FCC Financial Reports (for 1976–1980); Television Digest (for 1981).

[The following information was subsequently received for the record:]

HILL/MANDELKER FILMS,
November 9, 1983.

Senator BARRY GOLDWATER,
U.S. Senate, Committee on Commerce, Science, and Transportation, Washington, D.C.

DEAR SENATOR GOLDWATER: It has come to my attention that after my testimony on Wednesday, November 2, Mr. Everett Erlick departed from his prepared testimony in an effort to ". . . put Mr. Hill in perspective for the committee". As the producers panel was scheduled to testify prior to the networks, we did not have an equivalent opportunity to respond and, therefore, I would ask you to consider the following:

(1) I joined ABC in 1976 not, as Mr. Erlick states, in 1977.

(2) Mr. Erlick claims that I renegotiated my agreement in 1979 when, in fact, it was ABC who approached me asking that the term of my deal be extended. The inference that I initiated a renegotiation is incorrect.

(3) ABC insisted that the terms of my deal remain confidential. Their disclosure of these terms in so public a form as the U.S. Senate is an uncalled for breach of confidence.

(4) In the three years since our formation, Hill/Mandelker Films has produced 16 hours of primetime programming for CBS, eight for ABC and four for NBC. Mr. Erlick's effort to credit ABC with our success is, in light of the facts, somewhat overstated.

(5) The two "back-end" commitments to which Mr. Erlick refers were in no sense extraordinary. All three networks have engaged in the practice of awarding to both executives and performing talent production commitments. While this practice may hide from the shareholders the true cost of either actor or executive compensation, it reveals to the Producer's Caucus yet another aspect of anti-competitive network practice.

It is absolutely true that ABC helped us establish our company. ABC Television President, Tony Thomopoulos, and Senior Vice President, Brandon Stoddard, were both generous and supportive. However, the support that ABC provided for our company does not in any way detract from the merits of the arguments that the independent production community has made. Until there are truly viable alternatives to the three network oligopoly, the free marketplace of television requires not merely retention but strengthening of the current FCC Financial Interest and Syndication Rules.

Yours sincerely,

LEONARD HILL.

Senator GOLDWATER. Mr. Lilley.

Mr. LILLEY. Thank you, Chairman Goldwater, Chairman Packwood.

My name is William Lilley III, vice president of CBS. I would like to begin my presentation by showing a film clip which, happily—I wish it was planned—turns out to be exactly pertinent to the reason why we have been sitting here for as many hours as we have been.

Would you please roll the tape.

[A film clip was shown.]

Mr. LILLEY. Chairman Packwood, about 15 minutes ago you asked what were those days, and I think those clips really demonstrate, when you said to previous witnesses, "Was programing better, or was it worse before the rules? Could you please give me an answer?" You notice all those panelists that had been so vocal up to that point had no answer to your question.

I think those clips demonstrate the critical reason why everyone who has looked at this issue on the merits has said that these rules should be repealed and legislation such as Senator Wilson is offering should not pass. The belief is that companies like CBS, ABC, and NBC need relief from regulations like the financial interest and syndication rule in order to have direct access to independent producers to bring to the public programs which are fresh, new and creative.

Those six programs which you saw on those clips, of which CBS is extremely proud, were produced prior to the financial interest and syndication regulations went into effect. Each was produced at that time by a small fledgling independent producer with whom CBS dealt directly.

Now, everyone knows that before the rules the networks had the freedom to do that, and therefore producers, small or large, could either turn to other producers, established studios, members of the MPAA, or to the networks for up-front financing. And as a result, small producers who were unable at that time to bear the risk of program production themselves were able to go into business. Interestingly, two of them, MTM and Embassy, were financed prior to the rules by my company, CBS.

We now have a history, almost 12 years of the rules, and what have been the results? Well, instead of having a system of television production which relies upon a large and ever-larger constellation of producers—in this very profitable business, you would think that with the historical profits the constellation of producers would get larger and larger. You have the opposite. You have a system in which the number of people producing programs is being funneled down almost year by year, because the funnel forced upon the system by the regulation funnels small independents into the hands of the large Hollywood studios.

I have debated Mr. Valenti I do not know how many times on this issue. But until today I had never heard Mr. Valenti tout Daily Variety as a better source of statistical data than the Network Inquiry Independent Study and the Federal Trade Commission.

Now, Chairman Packwood asked Mr. Valenti the question about how many producers there were before the rules and how many there were afterwards. There is a whole page laid out in the tentative decision, August 4, of the FCC which looks at the number of people that have argued and studied that issue. Everyone who has studied it based upon data submitted by Hollywood producers, most recently the Federal Trade Commission, have said the number of suppliers has decreased 32 percent since the rules went in. I don't know how Daily Variety gets different numbers.

In the same point, data submitted by the Hollywood community to the Federal Trade Commission shows that since the rules went in the number of shows, not only of independent producers absolutely decreased, but the number of shows being produced independently of an MPAA member has decreased almost 20 percent.

And just because of these rules, as production for the networks has become funneled down from the big studios, on the syndication issue, the syndication of recent reruns to independent television stations also has become funneled. We have heard a lot of talk today that the Hollywood production community and who plays in it is not a cottage industry. That is production. The same holds for syndication.

The four biggest Hollywood studios now control 60 percent of the programs that have recently come off the networks and entered syndication. MCA-Universal, the largest, controls 25 percent, Columbia 14.

What you have in short are rules which protect large studios from competition from new producers. You have rules which inadvertently have placed production in fewer, not more, hands. And that is the reason which explains the intensity with which the current Hollywood establishment is fighting to retain these rules.

Repeal of the rules, the failure to pass legislation such as Senator Wilson's repeal of the rules, will open the production funnel to new fledgling production companies. That will mean more diverse viewing for the American viewer. It will mean more competition for Mr. Valenti's clients, but that is precisely the reason why every Government agency involved in this proceeding has said that the rules should be repealed, because repeal means more competition.

Thank you very much.

[The statement follows:]

STATEMENT OF WILLIAM LILLEY III, VICE PRESIDENT, CORPORATE AFFAIRS, CBS INC.

THE FCC'S TENTATIVE DECISION OF AUGUST 4, 1983 CULMINATES ONE OF THE MOST THOROUGH REGULATORY REVIEWS EVER UNDERTAKEN BY THE FCC

In 1977 the FCC announced it would undertake a major investigation of network television practices. In 1978 Congress approved a supplemental budget request from the FCC for the study, known as the Network Inquiry Special Staff (NISS). In 1980, after receiving public comment, the NISS published its final report. Its conclusion was that the financial interest and syndication rules had unintended, anti-competitive effects and should be repealed.

In June 1982, by unanimous vote, the FCC began its formal proceeding to review the rules. In January 1983, some 220 parties filed initial comments. In March, 40 parties made their case directly to the Commission in oral presentations. In April, 35 parties filed reply comments. On August 4, the FCC issued a compromise Tentative Decision which proposed to repeal the financial interest and continue the prohibition on the syndication of reruns by the networks until 1990. On September 20, the FCC received another round of comments on the Tentative Decision.

During these "unusually long comment and reply comment periods" (FCC, Tentative Decision, p. 4, par. 9), a diverse group of organizations publicly endorsed repeal of the rules. These groups include minority groups, consumer groups, labor unions, and religious organizations and other public interest groups.

The three federal agencies that participated—the Departments of Justice and Commerce and the Federal Trade Commission—were unanimous in recommending that the rules should be repealed or modified. The Department of Commerce and the FTC recommended total repeal. The Justice Department recommended repeal of the finanical interest rule and substantial modification of the syndication rule.

Government study	Recommendation on the financial interest rule	Recommendation on the syndication rule
FCC network inquiry special staff	Repeal	Repeal.
Federal Trade Commission	...do	Do.
Department of Commerce	...do	Do.
Department of Justice	...do	Substantially modify.

"The Department has concluded that the original justifications of the rules as means of promoting competition and diversity in the program production market are unfounded. The rules do not promote, and to some degree may retard competition in production, and in no way reduce whatever market power the networks may have as buyers of programs." (Department of Justice, Comments, January 26, 1983, p. 3)

"The proposed rule is a reasonable one, consistent with the goals of protecting competition in the syndication market and of avoiding regulations that may reduce economic efficiency and competition. By prohibiting the networks from engaging in any domestic syndication of off-network prime time entertainment series, the rule should eliminate any serious risk of 'warehousing.'" (Department of Justice, Comments on FCC's Tentative Decision, September 20, 1983, p. 2)

"In our view, it is inappropriate for the Commission to concern itself with allocating revenues and profits among individual firms and industry segments, particularly as no clear public interest purpose has been demonstrated. There also is convincing evidence that the Rule was uncalled for when it was promulgated and, in any case, has not achieved the goals articulated by the Commission at that time." (Department of Commerce, Comments, January 26, 1983, p. 3)

". . . the rule has not resulted in significant economic benefits, such as enhancing efficiency, promoting competition, or increasing consumer welfare. Moreover, economic analysis indicated that the rule's operation actually has had certain harmful effects, especially by preventing the most efficient allocation of the risks of program production." (Federal Trade Commission, Reply Comments, April 26, 1983, p. 1)

THE RULES PROTECT THE LARGE HOLLYWOOD STUDIOS AND ESTABLISHED PRODUCERS, AT THE EXPENSE OF SMALL, INDEPENDENT PRODUCERS

The rules have favored the large Hollywood studios and established program producers at the expense of small, independent producers who want to break into the business. Before the rules, small producers had the freedom to turn to either the networks or the movie studios to secure upfront financing for their productions. The rules now prohibit the networks from offering upfront risk capital to small producers in exchange for a profit share. As a result, producers who are unable to bear the risk of program production themselves rely on the major studios and established production companies.

"By removing the networks as sources of financing for new TV shows, the commission (in 1970) in effect turned production almost totally over to the major studios like Paramount, Universal, Warner Bros. and Twentieth Century-Fox and to the big independents like MTM, Lorimar and Spelling, who are able to afford the megabucks necessary to launch a new program. That reasoned the (Network Inquiry Special) staff in a 1980 report, simply concentrated the program supply power in fewer hands instead of dispersing it." (Time, August 15, 1983)

Program supply to the networks thus has become funnelled through the major Hollywood studios. Their share of program supply increased and the share of independently produced and supplied programming decreased.

". . . this evidence indicates that the rule has altered supplier relationships, with studio-independent ventures increasing markedly and with the proportion of programs produced solely by independents dropping markedly." (Federal Trade Commission, Reply Comments, April 26, 1983, p. 45)

This arrangement is fine for the Hollywood establishment, but it disserves writers and small, independent producers from breaking into the production business. As the Department of Commerce concluded, contrary to the FCC's intent in 1970, the effect of the rules has been to make it more difficult for unknown producers to enter the business.

As the FCC found:

". . . the diversity of programming actually produced may have been reduced because the rules have encouraged production using tried and true formulas." (FCC Tentative Decision, p. 45, par. 135)

"By making it more difficult for risk-averse producers to survive, the rules may aid those producers who are more willing and able to bear risk. Thus, if larger, established producers are better able, and hence more willing, to bear risk than smaller or new producers, the current rules work to the advantage of the larger producers who are relatively better off and insulated, to some degree, from competition and new entry. The end result may be a more concentrated and less diverse program supply industry." (FCC Tentative Decision, p. 46, par. 136)

Opponents to repeal argue that this arrangement is necessary to counterbalance the weight of the three networks. But those who benefit from the rules are not small, undercapitalized companies in need of government protection.

Both the principal suppliers of television programs to the networks and principal syndicators of off-network programs to independent television stations are parts of large, international, multi-media conglomerates. Paramount is owned by Gulf & Western; Warner Bros. is part of Warner Communications Inc.; Universal is part of MCA; and Columbia Pictures Television is owned by Coca-Cola.

1982 revenues of parent corporations of companies opposing repeal of the rules

	Millions
Coca-Cola (Columbia)	$86,249.7
Gulf & Western (Paramount)	5,498.3
MCA (Universal)	1,587.6
MGM/UA	806.3
Metromedia	407.1
Twentieth Century-Fox	567.5
Viacom	274.8
Walt Disney	1,030.3
Warner Communications Inc	3,990.0

THE RULES HAVE NOT WORKED

Although the rules were intended to lessen concentration in the program supply industry and thereby increase diversity in the sources of programming, they have had exactly the opposite effect

As the FCC found:

"There seems to be no disagreement [among all the parties in this proceeding] that, in the years immediately following the adoption of these rules, the number of producers supplying programming for prime time network exhibition declined rather dramatically." (FCC Tentative Decision, p. 47, par. 139)

PROGRAM SUPPLIERS DECREASE

	Prerule 1964/65–1970/71	Postrule 1971/72–1981/82	Percent decrease
Average number of program suppliers [1]	69	47	32
	Prerule 1969/70	Postrule 1981/82	Percent decrease
Number of program suppliers [2]	60	41	32

[1] Source: Data from ICF study, app. 3.
[2] Sources: 1969/70 data, NISS: 1981/82, CBS comments, p. 149.

"Contrary to its intent the Rule appears to have stabilized or increased concentration in the program supply industry by making it more difficult for unknown independent producers to find partners with which to share their risks." (Department of Commerce, Comments, January 26, 1983, p. 12)

". . . even using the data most preferred by the proponents of continued regulation there is no evidence that the rules have decreased concentration and, indeed, there is some evidence that they have increased it." (FCC Tentative Decision, p. 47, par. 140)

The rules discourage investment in original nonprimetime programming

The rules have unintended effects beyond affecting primetime television. The rules prohibit any part of CBS, not just the Television Network, from selling television programs on a station-by-station basis.

The local stations that CBS owns have substantial production facilities, but the rules have discouraged CBS stations from developing and distributing programs of regional interest. In Chicago, for example, WBBM produced a one-hour broadcast of the Chicago Symphony performing in London. Because the station could not share financing costs with other stations through regional syndication of the program, further projects with the Symphony were not undertaken. KMOX in St. Louis developed a series on the history of sports, including a program on the St. Louis Cardinals. Because the station could not syndicate this program regionally, production was forced to proceed on only an irregular basis.

The rules also prevent CBS from producing high-quality, non-network original programming. The Muppets is a case in point. Although the CBS owned television stations created the program, they could not by themselves finance the production, in part because CBS is precluded from sharing in syndication profits.

The rules increase advertising costs

By restricting the networks' ability to deal directly with producers and thereby, in effect, forcing them to go through the movie studios for television product, the rules set the major Hollywood studios up as middlemen in the supply of television programs to the networks. As a result, the system for television production is made less efficient. This inefficiency results in increased costs which are ultimately passed onto the consumer in the form of higher advertising costs.

The FCC concluded: "To the extent the rules prevent an efficient sharing of program risks, there is less investment in network programming than there would be in the absence of the rules and the quantity, quality, and diversity of programming is artificially limited. Also, inefficient risk-sharing could lead to higher program production costs. In turn, the cost of network time to advertisers and the cost of advertised products to consumers likely are greater than they otherwise would have been." (FCC Tentative Decision, p. 45, par. 135)

THE NETWORKS WILL ENCOURAGE THE DEVELOPMENT OF INDEPENDENT PRODUCERS AND THEREBY INCREASE THE DIVERSITY OF NETWORK PROGRAMING

Opponents to repeal argue that without the rules, networks would: (1) Use their new power to force independent producers out of business, or (2) make independent producers "employees" of the network.

On the first point, networks have relied and will continue to rely on outside independent producers because that is where the best creative resources are. Such resources are vital to the production of successful programs. In fact, before the rules, CBS financed independent productions that remain among the best ever produced for primetime television.

An advertisement recently placed by CBS in trade papers underscored the contributions independent producers have made to television and how the rules limit the choice available to them in seeking financing for their work.

As the FCC concluded:

". . . it does not seem in the best interest of the networks to behave in a manner that indiuces producers to exit. If there were fewer producers, they could more effectively act collectively and exercise market power with respect to their dealings with the networks. Under such an outcome, networks would be made worse off." (FCC, Tentative Decision, p. 44, par. 132)

On the second point, networks do not desire to make producers network employees. Under the current consent decrees, CBS could produce "in-house" as much as two-and-one-half hours of primetime entertainment programs per week. However, during the period from 1971 to 1982, when the networks could have produced programs "in-house," CBS relied overwhelmingly on outside production. This is because networks are interested in the best possible programming and recognize that creativity often comes from outside production.

FROM 1971–1982 CBS HAS NOT FAVORED IN-HOUSE PRODUCTION

	Pilots produced	Series selected
CBS	1515	4
Outside suppliers	400	122

The development of additional programming suppliers is in the public's interest as well as that of the networks. An increase in programming sources can only result in more diversity and variety of programs.

THE RULES HAVE NOTHING TO DO WITH CREATIVE CONTROL

The rules were never intended to affect the creative process and there is no evidence that they have done so. There will always be a creative tension between the production community and network executives—just as there is between authors and publishers, and reporters and editors. This process has nothing to do with the rules.

As the FCC found:

"Even with the rules in place, each network selects which program it will air and which it will not and thus holds veto power over any content it does not wish to air. Accordingly, producers' fear of losing creative control of their programs if the network regain a financial interest appears unfounded." (FCC Tentative Decision, p. 44, par. 131)

Networks must serve a mass audience with programs responsive to a broad variety of viewer interests and tastes. A network cannot abdicate its editorial responsibility to any producer, no matter how gifted. Acquisition of a financial interest in a program will not affect the exercise of this responsibility one way or another.

THE NETWORKS HAVE NO INCENTIVE TO "WAREHOUSE" OR WITHHOLD PROGRAMS FROM SYNDICATION—IN ANY EVENT, THE FCC COMPROMISE MAKES ANY SUCH WAREHOUSING IMPOSSIBLE

Syndication is the sale of television programs on a station-by-station basis. It refers both to: (a) the sale of original, first-run programming such as The Muppets and PM Magazine, and (b) the sale of "reruns" of primetime entertainment series to individual stations (usually independent stations, i.e., stations not affiliated with one of the three major networks).

The argument has been made that if the networks are permitted to engage in the syndication business, they will withhold off-network programming from independent stations in order to harm a growing competitor.

There are three responses to this argument. First, before the rules, the networks never obtained anything close to a monopoly position. The three networks obtained syndication rights in less than 25 percent of the primetime entertainment programs that appeared on the networks.

Second, to the extent a network does obtain syndication rights, it pays for them, and hence has every incentive to recoup its investment and receive the potentially large rewards of syndication revenues.

Finally, the FCC concluded that the probability of warehousing is only "slight." In an abundance of caution, however, the FCC—even though it does not believe the networks will warehouse programming—imposed new restrictions on the networks to prevent any such conduct from occurring. The revised syndication rule, which is patterned after the Department of Justice proposal, prohibits networks from retaining any active interest in the syndication of primetime programs, and prohibits networks from imposing any conditions, terms or restrictions over the manner in which the program is syndicated. In other words, to the extent there may be a problem here, the FCC has taken care of it.

PRODUCERS WILL NOT "GO OUT OF BUSINESS" IF NETWORKS CAN OBTAIN SYNDICATION RIGHTS

Producers allege that they "deficit finance" their own programs, i.e. the network license fee and developmental payments do not entirely cover the cost of producing the program. Consequently, producers argue that they must have profits from off-network syndication to cover these deficits and give them the profit incentive to engage in program production.

Networks cannot prove whether some producers deficit finance their programs because they do not have access to the producers' books and cannot examine cost and revenue allocation. However, the best public indication of whether and to what extent most television programs are or are not deficit financed by the producer is contained in SEC filings (Annual Reports and 10–K statements). These clearly indicate that it is the network and not the producer which incurs the risk of financing television production:

"MGM generally will not produce a series unless it expects that its direct production costs will be recouped even if only the minimum number of episodes is ordered." (Metro-Goldwyn-Mayer Film Co. 1981 10–K)

"In general, properties are developed at the request of a network and the network's license fees cover substantially all of the cost of development and production of the pilots and resulting series." (Columbia Pictures Industries 1981 10–K)

"Television has the potential for being a very rewarding and profitable business. Cost of production is essentially assumed by the networks." (MGM Film Co., 1981 Annual Report)

Other suppliers have expressed similar views:

"The networks generally finance the development and production of concepts and programming accepted by them, and the Company has been able to secure network financing for the development and production of many of its properties."

"Historically the Company has funded its expansion of television production principally through advances from the three major U.S. television networks." (Lorimar Prospectus [October 21, 1981], at 9.)

BEFORE THE RULES, NETWORKS FAIRLY BARGAINED FOR FINANCIAL INTERESTS AND SYNDICATION RIGHTS—THEY DID NOT "EXTORT" THEM AS A QUID PRO QUO FOR ACCESS TO THE NETWORK WITHOUT PAYING A FAIR PRICE FOR THEM

The following examples are representative:

"M*A*S*H" (Twentieth Century-Fox). CBS did not acquire syndication rights and acquired only a 25 percent financial interest which was reaquired by Fox in the fourth year of the network run.

"Mary Tyler Moore Show" (MTM Enterprises). CBS acquired syndication rights but acquired no financial interest.

"Bob Newhart Show" (MTM Enterprises). CBS did not acquire syndication rights and acquired only a 40 percent financial interest.

"All in the Family" (Tandem Productions, Norman Lear, executive producer). CBS acquired syndication rights but did not acquire any financial interest.

Producers' bargaining power clearly increases over time. Seemingly final contracts are consistently renegotiated over the life of a series. The economic consultants retained by the coalition of Hollywood studios and producers seeking to keep the rules conceded this point in the material they submitted to the FCC:

"After the third year or so, if the show is still successful, and despite the original contract terms . . ., the balance of power shifts considerably to the producer." (ICF Study, Paper 1, Chapter 1, p. 16)

M*A*S*H SHOWS HOW THE UNREGULATED MARKETPLACE WORKS

"M*A*S*H"—one of the most successful half-hour series in television history both on CBS and in syndication—has been cited as an example of how the financial interest and syndication rules work. Representatives of motion picture studios have argued that "M*A*S*H" appeared in syndication during the CBS network run only because the rules prevented CBS from acquiring syndication rights. If CBS had the syndication rights, the argument goes, CBS surely would have warehoused the reruns of this successful program.

But the "M*A*S*H" example—its negotiation, network run and syndication—actually reveals how the marketplace, not regulation, is successful.

Fact: "M*A*S*H" was negotiated before the rules. CBS's attempt to acquire syndication rights from Fox was not successful.

It has been argued that, without the rules, CBS would have controlled syndication rights to "M*A*S*H." But CBS negotiated with Twentieth Century-Fox before the rules were in effect. CBS obtained network exhibition rights but Fox would not sell CBS domestic and foreign syndication rights.

"M*A*S*H" typifies the inability of broadcast networks to acquire syndication rights to programs supplied by the major Hollywood studios. Prior to the rules CBS virtually never purchased syndication rights in series supplied by major Hollywood studios.

Fact: During its network run, "M*A*S*H" contracts were constantly renegotiated by Twentieth Century-Fox on terms increasingly favorable to Fox.

It has been argued that the rules are needed to prevent the networks from "controlling" contract terms over their suppliers. The contract history of "M*A*S*H" demonstrates that whatever "bargaining power" existed between CBS and Fox, it was exercised by Fox—the supplier. In initial negotiation, Fox and CBS profit shares 75/25, Fox retained music rights and CBS purchased merchandising rights. In renegotiating the fourth television season of M*A*S*H, Fox reacquired both mer-

chandising rights and its 25 percent profit share to Fox. In renegotiating for the ninth television season, Fox reacquired all rights it ever held in any episode of M*A*S*H. So, over the life of the series, CBS gave back all interests and rights it had initially acquired from Fox.

More important, Fox successfully renegotiated an increased license fee per episode each time that CBS negotiated to renew "M*A*S*H" for another television season. The license fee per episode rose dramatically over the 11-year history of the program.

Fact: Fox controlled the timing release of "M*A*S*H" in syndication.

CBS received exclusively to "M*A*S*H" for the first five television seasons. CBS also purchased exclusively to "M*A*S*H" for the sixth and seventh television seasons. However, in renegotiations for the eighth television season—1979/80—Fox did not sell exclusively to CBS because Fox had already committed "M*A*S*H" to local stations to begin syndicated broadcasts in September 1979.

"M*A*S*H" is clearly not an example of how the financial interest and syndication rules ensure syndication of off-network series, as opponents of repeal argue. Fox controlled syndication rights from the start—before the rules were in effect. Fox renegotiated contracts on terms increasingly favorable to it. And Fox determined when it would sell "M*A*S*H" in syndication.

THE RULES HAVE THE UNINTENDED EFFECT OF FAVORING PAY TELEVISION OVER FREE, OVER-THE-AIR BROADCASTING

The rules introduce an unintended bias towards pay television in the video marketplace. The networks are not arguing that the rules should be repealed in 1983 because the networks have a smaller audience share not than they did in the 1960's. When the rules were adopted there were essentially three buyers of television programs. (In fact, ABC did not become fully competitive until the mid 1970's.) There are now alternative buyers whose success is not measured by audience ratings. The pay television networks, like HBO and Showtime, measure their success and their purchasing power of programs by subscriptions, not audience.

The pay networks are our most formidable competitors for the development and purchase of programs. The are not restricted by any regulations like the financial interest and syndication rules. From a public policy point of view, it makes no sense to keep regulations on the three networks which limit their ability to acquire programming. Without a "level playing field," the best programming may gravitate to the pay networks. Many of these services are unavailable in many urban centers or rural areas. Even when these services are available, the ability to subscribe reflects individual or household income. The nation's system of free, over-the-air broadcasting and the consumers it serves are, in effect, being penalized by rules that have become outdated in the face of new distribution systems that were not anticipated when the rules were adopted.

Senator GOLDWATER. Thank you very much.

Mr. Chairman.

The CHAIRMAN. Mr. Lilley, why are not the smaller independent producers beating down our doors for repeal, if they are basically in the grasp of the larger independent producers?

Mr. LILLEY. Well, Chairman Packwood, there are several answers to that. We recently placed an ad in all of the trade papers, Broadcasting, Variety, Hollywood Reporter, in which we listed the shows we had done prior to the rules with small independent producers and said that that was our intention, to do more of that. We have received in our own Hollywood operations with the network a large number of people coming to us and saying: We are here, here is the phone number, call us when it is over.

Terrific, we say, will you stand up now? Everyone would like to hear it. We cannot stand up now, they say, because we work for the people who are fighting repeal of the rules.

The CHAIRMAN. The argument has been made you do not have a level playing field, or will not have, and that pay television is going to gobble you up. And Mr. Erlick indicates about the 1984 Olympics, the second biggest bidder was pay.

Do we have any example of where pay has won something, has taken something away from you?

Mr. LILLEY. Yes, sir, I have two excellent examples, if I could, because we are the network loser. Two of the most popular performers of all time on the CBS television network are Kenny Rogers and Willie Nelson. This month, for the first time in the history of the CBS television network, they go off of CBS and onto HBO.

They are doing that because of these rules. It is wholly inadvertent. It is not deliberate. We are not complaining.

The CHAIRMAN. Why is that? Did they simply outbid CBS?

Mr. LILLEY. Mr. Nelson and Mr. Rogers are excellent businessmen, and what they look at is the bottom line that an enterprise can bring to them for their talents, in this case a special of some sort, because we can only offer one run and a rerun. Even though we can maybe pay more for that one shot than HBO will do for its shot, HBO-Time Inc. can offer a number of distribution outlets, particularly first-run syndication.

Therefore, the bottom line, which is all Mr. Rogers and Mr. Nelson, because they are in business themselves, care about, they go to HBO.

Mr. ERLICK. Might I just add, Mr. Chairman, that there are dozens of examples, which we will be happy to furnish you, of motion pictures on which the three networks individually have been outbid by HBO and have gone first on HBO. We would be glad to submit to the committee such a list.

The CHAIRMAN. I would like to have that, because the argument is made over and over that, although your audience is shrinking, it is shrinking from 80 percent to 75 percent and you are still dominant, so it is a moot point. And I would like to have that information.

[The following information was subsequently received for the record:]

EXAMPLES OF MOTION PICTURES WHICH APPEARED ON HOME BOX OFFICE BEFORE COMMERCIAL NETWORK TELECAST

Title	Network	Broadcast season
Heaven Can Wait	ABC	1983–84
Nighthawks	ABC	1983–84
Stir Crazy	ABC	1983–84
For Your Eyes Only	ABC	1983–84
Cannonball Run	CBS	1983–84
S.O.B	CBS	1983–84
Bustin Loose	NBC	1983–84
On the Right Track	NBC	1983–84
Airplane	NBC	1983–84
Promises in the Dark	CBS	1982–83
The Bell Jar	CBS	1982–83
Defiance	CBS	1982–83
Fedora	CBS	1982–83
World's Greatest Lover	CBS	1982–83
The Promise	CBS	1982–83
The Passage	CBS	1982–83
Cattle Annie & Little Britches	CBS	1982–83
Borderline	CBS	1982–83
Altered States	ABC	1982–83
Mountain Men	ABC	1982–83

EXAMPLES OF MOTION PICTURES WHICH APPEARED ON HOME BOX OFFICE BEFORE COMMERCIAL NETWORK TELECAST—Continued

Title	Network	Broadcast season
Melvin & Howard	ABC	1982–83
The Prophecy	ABC	1982–83
1941	ABC	1982–83
The Shining	ABC	1982–83
Apocalypse Now	ABC	1982–83
Incredible Shrinking Woman	ABC	1982–83
Rough Cut	ABC	1982–83
Legend of the Lone Ranger	ABC	1982–83
Buddy Holly Story	ABC	1982–83
Death on the Nile	ABC	1982–83
Time After Time	CBS	1982–83
Bronco Billy	CBS	1982–83
Back Roads	CBS	1982–83
Just Tell Me What You Want	CBS	1982–83
Little Darlings	NBC	1982–83
Urban Cowboy	NBC	1982–83
Just You and Me Kid	ABC	1982–83
The Island	ABC	1982–83
First Family	ABC	1982–83
Star Trek	ABC	1982–83
The Warriors	ABC	1982–83
American Gigolo	ABC	1982–83
China Syndrome	ABC	1982–83
The Black Stallion	CBS	1982–83
Any Which Way You Can	CBS	1982–83
The Hunter	CBS	1982–83
Zorro, the Gay Blade	CBS	1982–83
9 To 5	CBS	1982–83
The Jazz Singer	CBS	1982–83
The Mirror Crack'd	CBS	1982–83

Mr. LILLEY. Chairman Packwood, if I could just add, because I heard your talk on this subject, I think that what HBO is doing is very good for the consumer and the American public, and I think that is the reason why our three companies should be allowed to participate in it.

The CHAIRMAN. I did not say you were complaining about it, but that you would like to compete with them.

Mr. LILLEY. And we think it is good that the viewer can enjoy product on a number of ways of distribution, and therefore, whether it is a cassette or syndication or cable or pay cable or network television. But it does not make any sense to deprive those viewers who are tied to one entity, the three networks, from having that kind of access.

Mr. MULHOLLAND. Chairman Packwood, I think there is a common misapprehension that went through much of the discussion this morning, that everything should be judged by audience. What we are talking about here is our ability to compete in the marketplace where we buy our programs, and our ability to compete in that marketplace does not necessarily equate to audience.

When HBO comes to the table and when we come to the table, what we are talking about is money, not audience. They generate their revenue differently than we generate our revenue. But when you come to the table where I am going to buy a program, whether

I am going to try to entice Norman Lear to work for me or Mary Tyler Moore or someone to buy a film, or whether I am going to try and buy a heavyweight boxing match, it is just money.

And the pay services come to the table now with as much money as we have. That is what we are talking about.

The CHAIRMAN. I take it for all practical purposes that is why we no longer see any major heavyweight fights on free television. You have simply been outbid.

Mr. MULHOLLAND. That is correct. Last week I had two gentlemen in my office from South Korea. The bidding will soon take place on the 1988 Summer Olympics, which are being held in Seoul. These gentlemen came in and they said: "Well, by 1988 pay television and pay per view will be clearly the most important things in the United States. So, who do we go to deal with to sell the rights to the Olympics?"

Well, I restrained myself from throwing them out the door first, and I told them that I did not think that that would be the case in 1988. But that is what they think, and that is where they are going and that is what they are looking at.

And when we go to the table in a few months to bid for the 1988 Olympics—and that bidding will take place in the next 3 or 4 months—I am convinced we will find other people sitting at the table. I know that someone will be there from ABC and I know someone will be there from CBS and someone will be there from NBC, competing with each other.

There will also be a few other people at that table, and when you are asked to put the money up everyone will be able to put up the same money. We are all bidding for the same program.

Mr. ERLICK. May I just add one more thought to that, please, sir, and that is, with the economics that I have described earlier, all three networks are deriving an increasing amount of their profits from daytime television, not prime time television. I think that is generally understood.

Our affiliates are going to testify before you on Friday, I believe, and while I do not want to preempt their testimony, I just want to use it as illustrative of two points. Mr. Valenti, with his usual ability to overstate, said that the networks have no allies in this debate, this great debate. We have 600-odd affiliated stations who are connected with the three networks, who have a very decided stake and interest in this proceeding and who have filed statements accordingly.

One of the principal concerns of those affiliated stations is that these rules will inevitably drive the networks to invest in pay television programing as opposed to advertiser-supported free television service. If we see that as an increasingly important option because the rules are so restrictive and because we are not on a level playing field, you are going to find the networks behaving like any other normal businessman would and invest in what may be a new wave of opportunity in pay television. That is a principal concern of the affiliates, and I submit to you it should be your concern and even more so a concern of the American public.

The CHAIRMAN. And you know what is coming when that happens. You will then get hit by Congress for selling the World Series

to pay television and not allowing us to see it, and we will blame you for that decision.

Mr. ERLICK. There is no question about it. I will not be here, though. [Laughter.]

The CHAIRMAN. You heard over and over the argument about deficit financing, and how they have to have syndication in order to make it up. Do you want to respond to that?

Mr. ERLICK. I would be delighted. I think there is a very simple answer and you gentlemen, as businessmen who understand the business community and the way business people behave, can appreciate this, I think.

I have been in this business now for 33 years, about 10 years on the buy side with an advertising agency, where I was in charge of all network purchases, and I have been now for about 23 years with ABC on the sell side as an executive of that company and a member of the board and the management committee.

And I have heard a refrain for 33 years from Hollywood producers and Hollywood studios that they are being squeezed to death and bled dry by the dragons in New York, who are grinding them down with deficit deals that are terribly unattractive and are horrible to live with. Now, surely this has got to be the only business in the world, the only industry in the world, where intelligent businessmen, very intelligent businessmen who head these companies, who for 33 years have insisted on selling their product on a poor-business-risk basis.

There must be no other industry in the world where each year these people come to New York with their projects and their pilots and their series proposals and break our doors down. They laugh with joy when we buy and they cry when we do not. Surely it is the only business in the world where for this period of time these business leaders would have fought simply for the purpose of losing money.

I mean, that is shear nonsense and I do not think this committee or any other committee should spend much time considering that argument.

Mr. LILLEY. If I could add to that, Chairman Packwood, on page 16 of CBS' testimony, which will be in the record, we introduce the statements, the 10K's and annual reports filed with the Securities and Exchange Commission, of all the publicly held companies in the motion picture and television production business. In all, every one of those 10K's and annual reports, each company says that because of the rules the television production business is essentially a risk-free business in which the networks pay the cost of development through development cost and network license.

Mr. MULHOLLAND. Chairman Packwood, there seems to be a misconception that the Hollywood producers produce programs and then come to us and try to sell them. Not a single series program is produced in Hollywood before the network puts up the money to have it produced. These people do not produce their programing and then come around to the networks or to HBO or to Operation Prime Time with the program already made.

They come around first with an idea, and then we say to them: That sounds good. Here is $35,000. Go write a script. And then they

come back. We look at the script and we say: That sounds pretty good; here is $1.5 million, go make a pilot.

And then they come back. And it is all my money. And then they come back. And we look at the pilot—a pilot being the first episode for the series—and we say: Gee, that is good, let us go to series.

I am now going to pay $800,000 or more per hour to these producers. They may add a little bit more of their money or they may not, and we are going to put it on the air. I am going to order 13 of them if it is a new program.

Four or five plays, 4 or 5 weeks in, the American public may reject that program. I want the program to succeed. The producer wants the program to succeed. We are both trying to put on the best, most innovative, creative program we can. We are not at odds.

We buy creativity. I want Norman Lear to work for me. I want MTM to work for me. And as a matter of fact, virtually all of the programs that Mr. Blumenthal talked about happen to be on NBC, and I am very proud of that.

So we put the program on the air and we are rooting for America to like the program and the producer is rooting. And let us say we are wrong and the producers are wrong. America does not like the program. I own eight more episodes of that program. I have contracted for them. I have taken the risk, I am going to pay the money. The program has failed. The producer has my money. He has signed up, I have paid him. The risk was mine.

I would like to read you three sentences from the 1981 MGM annual report:

> Television has the potential for being a very rewarding and profitable business. Cost of production is essentially assumed by the networks. Television can produce a high return on investment with a modest amount of funds at risk.

It is our funds at risk and we use those funds to buy creativity, not to stifle it. It is the money from the networks that causes television production in Hollywood.

The CHAIRMAN. A last question, because my time is up. You can just answer yes or no. Did any of your networks in any way admit to any anticompetitive practices in the consent decrees?

Mr. ERLICK. The answer is "No."

Mr. MULHOLLAND. No, sir.

Mr. LILLEY. No.

The CHAIRMAN. Thank you.

Senator GOLDWATER. The FCC believes that cable viewing is going to increase, and yet everything we read indicates that cable has been unprofitable and is going down. For example, I understand that CBS's pay cable network went out of business after losing $40 million, and ABC's joint venture, satellite news channel, sold out after losing $30 million, and NBC's parent RCA gave up on the entertainment channel after losing $25 million.

Now, do any of you believe that this record points to increased pay cable viewership?

Mr. LILLEY. Mr. Chairman, if I could start out with answering that, since we have taken, as you say, the largest loss. I do not know of any financial analyst that believes that cable as an industry is doing poorly. The people that own the cable systems through-

out the country and that are building the new cable systems, with a very few exceptions, are very, very profitable and successful. The distribution point of that business is a very lucrative point. We as companies wish we were in it.

Second, in terms of the people putting channels on the air, providing the programing for cable, there is some shakeout that is going on. But you have got to remember—take HBO. HBO is functionally a network, even though it is not regulated as a broadcast network. HBO is the third most profitable network and it is more profitable——

Senator GOLDWATER. I think you make a mistake to keep harping on HBO. That is a very, very high-priced little bit of entertainment, but it is also of an exceptional quality—it is a much different kind of quality than you all put on or the ordinary cable company offers.

I know that the cable company I subscribe to just sold at a great loss, and there does not seem to me to be any big increase across this country in cable hookups. Now, what is the percentage, you believe, of the total cable viewership in this country?

Mr. LILLEY. I believe 50 percent of the homes are now passed.

Senator GOLDWATER. I doubt that.

Mr. LILLEY. We can provide that.

Mr. MULHOLLAND. It is about 40 percent of television homes are wired.

Senator GOLDWATER. For example, they have none in Washington, D.C.

Mr. MULHOLLAND. You are absolutely correct. That is one of the frustrations that we face when we come and talk to people here in the District when we talk about cable. In general, in the District here you will get seven broadcast signals at home. But across the river in Fairfax County, the most modern cable system in the United States is going in, which will have 126 channels. It is being wired now, and that is the future.

But in answer to your question, sir, I brought this with me. This is just the listing in USA Today under the title of "Tuesday Night's Guide for Prime Time Viewing," USA Today being a national newspaper. They begin, ABC, CBS, NBC, ARTS, ESPN, HBO, Cinemax, Movie Channel, Show Time, USA, WGN, WOR, and WTBS, national services now available across the country.

Senator GOLDWATER. I know all about those.

But the point I am trying to get at is, cable television is not offering you people all the competition that you think it is. I doubt that 40 percent of the American homes subscribe to cable. It is not available in many, many communities in this country. But I can stand corrected on that figure. I do not know what the figure is myself.

The losses that your own company has seen in cable would indicate to me that, if you are financially on the ball, and I think you are, you are not going to get into cable where you have been losing money.

Mr. LILLEY. Well, Mr. Chairman, we had the most ambitious program with CBS cultural cable. One of the reasons that we folded that enterprise after a substantial loss—and this is in the FCC record—is that the financial interest and syndication rules make it

extremely difficult, if not economically impossible, for us to operate any other kind of business that is associated with the television industry.

Because of the rules, we must segment out any product that runs on the television network and deal with that completely separately from any other business in the company. Therefore, we cannot take a new, infant, fledgling business like CBS cable and integrate it the way that HBO has done with Cinemax, its second network, buy a product for the two, and simultaneously develop product.

Our three companies are forced to run any other video business—cable or not—as a wholly stand-alone business, and it is just not going to work.

Mr. ERLICK. Mr. Chairman, I just wanted to add, in response to your direct question, this. These services were all in the form of program services designed to be advertiser-supported. The mistake that was made, I think, by the three companies was in a substantial overestimation of the advertiser dollar support, revenue support, available for such services, and perhaps some overestimation of the viewing that might take place.

That is a different question entirely from one which relates to the success of the cable industry as a whole. There are some franchises, to be sure, which are in trouble, but at the same time Boston is building, Philadelphia is building, Cincinnati is building, Houston, Dallas, Pittsburgh, and so on across the Nation.

So that we are going to see within a very few years at least a 50-percent penetration of the United States with systems which average 25, 35, 40 channels, and at that time you have to assume there is going to be further fractionalization of the network audience.

Senator GOLDWATER. I will recognize that you have to make money on advertising or you do not stay in business; it is that simple. Even though it burns me up to have a football game interrupted right through the whole thing; when the red card shows on the sideline I get another beer. So I do not pay any attention to advertising.

But you have to make money on advertising, and I will note that not many cable companies are showing advertising, because they cannot get it. The point I am making is that I do not believe at the present time cable is presenting you with all of the competition that you feel that you are getting.

For example, the Wall Street Journal reported that ABC's net income in the second quarter of this year was a record for any quarter in your 30-year history. Now, we are not here to meet on the subject of your finances. That is none of our business.

Our business is to look at the rules and determine whether the FCC has been doing it in the right way, and also should we repeal them or should we not?

If you are not making money, it is none of my business. If you are not making money because of the rules, then we ought to know about it.

Mr. ERLICK. Well, we certainly agree that the Congress of the United States owes ABC or CBS or NBC no living, nor, sir, may I suggest to you, do you owe Hollywood the protection against and the insulation against a normal business negotiation process.

Senator GOLDWATER. I am just as much a believer in that system as you are.

Mr. ERLICK. I know you are, sir, and that is why I addressed the remark to you. I know you believe in it.

Senator GOLDWATER. Well, I have no further questions.

I am going to have to leave. Thank you, gentlemen, for coming.

The CHAIRMAN [presiding]. Senator Wilson.

Senator WILSON. Thank you, Mr. Chairman.

Mr. Chairman, to pursue a point that Senator Goldwater was making, I am looking now at annual reports, too. They are not for MCA or Coca-Cola. They are for the networks. And I find that not only, as Senator Goldwater has indicated, have they all decided that cable is something that they want to be out of, certainly at least for the time being, but in the CBS annual report projecting to 1990 there is a statement that cable-originated programing will increase its share to only 4 percent.

I note also that when Mr. Erlick mentioned the Tulsa study where there is very high, exceptionally high, cable penetration, he apparently cited that as an example of how cable was going to be competing with the networks. However, Arbitron ratings for 1982 show that, taking cable and noncable home together, the networks had a 78-percent share in prime time in Tulsa, which I think you would agree is still a dominant share.

I note that NBC's annual report shows that from 1981 to 1982 there was an increase in profit before taxes on income from $48 to $107.9 million.

In reading the ABC annual report, I find it says that:

> Even though 1982 saw increased competition, not just from traditional competitors but also from cable and other emerging media, in the face of that competition ABC television attracted more viewers from sign-on to signoff than any other distributor of television programing. It remains the largest, most successful single advertising medium in the world.

That is the end of the quote, except that the next paragraph goes on to report "record revenues and improved profits over 1981."

It seems to me Senator Goldwater has a point.

Mr. ERLICK. What is the point, sir, if I may ask?

Senator WILSON. I think the point, Mr. Erlick, is that you are saying that you are being challenged by cable. Yet in truth you had the most successful year, almost, in your history.

Mr. ERLICK. We are saying that these challenges are obviously on board and are increasing, and we are also saying that the Congress of the United States, we think, and the Federal Communications Commission owes us a fair competitive opportunity to acquire programs in a program supply marketplace without Government intervention. That is what we are saying.

I do not think it has anything to do with the balance sheet.

Senator WILSON. Mr. Erlick, well, you are certainly preoccupied with the balance sheets of Coca-Cola and MCA.

Mr. ERLICK. Only for a different reason, only to show that they do not need your protection.

Senator WILSON. Well, I do not think that you do, either.

Mr. ERLICK. We are not asking for it.

Senator WILSON. Well, I think that you are. But let us not engage in a contest on my time here. I have some questions I would like answered.

Mr. LILLEY. Senator Wilson, if I could just answer. I do not think that this proceeding, as the Government has constituted this proceeding—it was started by the Government—turns on the question of how much cable there is in any one market. The questions at issue are, is the network marketplace competitive, is the program supply marketplace competitive, and are they workably competitive between each other?

And everyone who looks at it says yes. The cable issue in that sense is a red herring.

Senator WILSON. Well, that is very strange, Mr. Lilley, because I must tell you, the major argument that has been advanced by the networks—certainly that is the understanding here on the Hill—is that because of a change in the competitive position of the networks that they need now to have the rules repealed, whereas in the time in 1971 in which they were adopted a different situation applied.

Mr. LILLEY. Senator Wilson, I think that some of MPAA's people, no the networks, have been arguing that point on the Hill as a major point. The three networks are bigger than the cable industry.

The proceeding itself does not turn on that issue. It deals with the relationships between the networks and the program supply community.

Mr. MULHOLLAND. And the program marketplace, the marketplace where we go to buy programs, that is what the rules deal with, the marketplace where we go to buy programs, not size of audiences. We tend to get hung up, Senator, on what size of audience one group has as opposed to another, when the revenue of different groups is generated differently.

What we are talking about is our ability to go and buy programs, and all we say is that we should have an equal ability to buy programs in that store to which people go in order to buy programs—actually to buy the people who make programs.

Senator WILSON. Speaking of marketplace, Mr. Mulholland, much has been made today of the fact that there is essentially a three-part marketplace, that the networks form together a monopoly. And what I heard offered in rebuttal to that was that that is not true, there can be ad hoc networks created.

Could you tell me how much, that is, what percentage of first run made for television programing is first put on by ad hoc networks, and what percentage by the networks in combination?

Mr. MULHOLLAND. I could not give you statistics, but you know the answer, which is why you asked the question. Clearly, between the three networks there are 66 hours of prime time to fill, 66 hours a week. And the networks are financing that programing.

Senator WILSON. Well, that leads to another point. I found that an interesting statement, and I would suspect that in his prior incarnation perhaps, if I understood, Mr. Erlick, you were once a buyer for an advertising agency.

Mr. ERLICK. Yes, sir.

Senator WILSON. Do you not think, gentlemen, that it is a fair statement to say that it is not the producer and really not the network either that pays for production? It is the advertiser.

Mr. ERLICK. Let me answer that if I may, since I am the one that originated the issue. The answer to your question is no. The network commits for programs well in advance of going to market with those programs. The network buys anywhere from 6 to 12 to 18 months lead time. We at that time make a financial bet on that program, which by and large relieves the producer of any further risk, for the most part.

Those programs are then scheduled by the network and then offered to advertisers. If we are fortunate they are fully sold. If we are not fortunate they are not sold.

The network is the risk-bearing entity, Senator, under any circumstances.

Senator WILSON. But to the extent that they are sold, you recover whatever risk you took, obviously.

Mr. ERLICK. If we are successful. That is a risk we take. That is the business we are in.

Senator WILSON. Well, why is it that the Association of National Advertisers in their testimony to the FCC so strenuously opposed the repeal of these rules and said that, where they are served by competition between the independents and the affiliates, they can look forward to a 20- to 60-percent cost break?

Mr. ERLICK. I think it is a misperception on their part of the effect that a change in the rules might have. In my judgment at least, I think there is a perception that if these rules were changed somehow the networks would be in a position to divert programing away from independent stations to affiliated stations. That is the underlying supposition.

I said at the beginning of my statement, which I do not want to repeat in full, that businessmen do not act so stupidly, nor would we ignore the obvious interest of the Department of Justice or the FCC or this committee if we were to engage in any such practice, nor could we ignore the interest of our partners in those programs, who would be badly misused and would undoubtedly bring litigation if we withheld some program from the marketplace.

I simply think it is a misperception on the part of the organization. They do not understand it.

Senator WILSON. Mr. Chairman, I have just one final question and it really has to do with the contention that cable is a threat in terms of being a competitor to obtain the kind of programing that will draw heavy audiences. And the example that was given was the heavyweight fight.

Do you really think that there is much of an analogy, Mr. Mulholland, between a heavyweight fight that has limited rerun potential and the kind of ongoing, multiepisode situation comedy which is really the staple of what we are talking about?

Mr. MULHOLLAND. Yes, Senator, I absolutely do. Your question really goes to the exact heart of the issue. The broadcast networks offer a total program service: News, sports, preemptions to cover wars, canceling of all commercials when Presidents are assassinated, which we all, regretfully, have some experience with, and run-

ning entertainment programs which we hope will get high ratings and satisfy not only the public but the advertisers.

The money from all of that, basically the money from entertainment, enables us to provide the other services that are so inherent in what we do. When the United States suffers a terrible tragedy, as we recently suffered in Beirut, you cover it and you go on the air. There is no question of, are you preempting, losing commercials or anything. You do it. That is expected from us.

The profits that we could get from being out from under these rules support our entire broadcast service, and that means bidding for Olympics, bidding for heavyweight fights, which we are no longer competitive in.

You are right, there are no reruns of heavyweight fights. That is a one time only. But the people who own television sets now who are not connected to cable do not see heavyweight fights as they used to any more on over the air television.

That is what we are talking about, the ability to continue to provide the total broadcast service that is expected of us. And to do that, we think that, since we take the risk in the entertainment programing, that we should be able to at least bargain for part of the syndication profits.

Senator WILSON. Thank you, Senator.

The CHAIRMAN. Gentlemen, I have no more questions. Thank you.

[Whereupon, at 2:35 p.m., the subcommittee was adjourned.]

COMPETITION IN TELEVISION PRODUCTION ACT

THURSDAY, NOVEMBER 4, 1983

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
SUBCOMMITTEE ON COMMUNICATIONS,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:30 a.m., in room SD-106, Dirksen Senate Office Building, the Honorable Barry M. Goldwater (chairman of the subcommittee) presiding.

OPENING STATEMENT BY SENATOR GOLDWATER

Senator GOLDWATER. The meeting will come to order.

Today we begin a second day of hearings on S. 1707, introduced by Senator Wilson and myself together with seven other Senators, to preserve for 5 more years the financial interest, syndication, and prime time access rules of the Federal Communications Commission.

As was the case on Wednesday, November 2, we have a very full schedule of witnesses and panels and, while I hate to say it, I think we are going to have to be a little more adherent to the rules and keep you on time if we can.

I agree with the views shared by many of the expert witnesses who testified on Wednesday that the subcommittee is not simply looking into a matter that involves the shifting of possible profits from one group of large companies to another. The fundamental issue before us is the public interest.

We must examine whether free television will continue to survive and be able to provide quality programing. We must consider the ability of the public to choose from among a variety of video sources and to enjoy diversity of television programs. Related to these questions, we must determine whether the rules promote a healthy and independent television industry and encourage the growth of independent program producers and distributors.

Now, to some degree we are being asked to become prophets of the structure and economic health of the television and program production industries in the future. For example, some witnesses have asked us to foresee a future in which the new media, constituted of pay cable, direct broadcast satellite service, video cassettes and discs, and other technologies, will soon dominate the television marketplace and weaken the competitive position of the three networks so much that they will be at a serious disadvantage.

The argument is that the networks will experience a profit squeeze which will prevent free television from providing the public with quality and diversity of programing. I would like to stress that word "quality" more. I only wish that this entire hearing could get into that subject, because if there is anything that the television industry needs it is a discussion on that.

Other witnesses have submitted evidence from the present indicating that cable companies and other alternative media are suffering large rating losses and very slow growth in ad spending, and that some are going out of business. Whatever the future projections may be, these witnesses remind us that the fact is the networks still enjoy an 82 percent share of the viewing audience, leaving only 18 percent to cable, independent stations, and all other services combined. Some witnesses have told us that even if the new media grows there will not be a market for the kind of unique programing required by the independent television stations.

The networks answer that we must be concerned with their ability to provide the public with a wide variety of programing. They should not be looked on as merely exhibitors of last resort for multiepisode series. The networks have also argued that they, not the program producers, bear the financial risk of acquiring and showing new programs and they should be able to share in any profits from the syndication of successful programs.

Producers contend the networks do not allow them to negotiate for a share of advertising revenues, and that the primary, often the only, way they can earn a profit is by holding onto the syndication rights.

Then movie studios and independent producers point out that we are not dealing with free market conditions. Because of Government-imposed regulations, the networks enjoy as a practical matter a strongly dominant position in the television marketplace, with a nationwide audience and the ability to generate greater advertising revenues. If the rules were not in place, this dominant position would also allow the networks to favor their affiliates and owned and operated stations to the detriment of independent stations.

Today we will hear from writers and actors' guilds, independent television stations, affiliates of networks, and public interest and minority groups. This subject raises many highly technical questions, but it also directly affects the viewing audience. Therefore, I think it is appropriate to hear from witnesses representing both professional interests and the general public, and I look forward to your testimony.

Bob, do you have any statement?

OPENING STATEMENT BY THE CHAIRMAN

The CHAIRMAN. Very short, Mr. Chairman. The same two things I indicated yesterday:

One, what will best serve the viewing public of America? I am not particularly concerned here with saving the chestnuts of either the networks or the producers, so much as I am in guaranteeing as best as possible that the best product appears for the viewers.

And two, is there a disparity of bargaining power so great between the producers and the networks that the producers need pro-

tection? And if that case can be proven, it is not uncommon in American law to provide protection. We have done it for small business in our antitrust laws and in a variety of other ways.

But those, Mr. Chairman, are the only two questions that I have.

Senator GOLDWATER. Thank you.

And I would remind all witnesses that if you have a prepared text we will put it in the record, and if you could contain your remarks to a brief of the paper it would be beneficial. And those little lights over there, the green light means you are on, orange light means better get moving and the red light means that your time is up. We are not hog-tied to that rule, but today we will be a little closer to it.

So we'll start with Ms. Naomi Gurian, Writers Guild of America.

STATEMENTS OF NAOMI GURIAN, WRITERS GUILD OF AMERICA WEST, INC.; JOHN SUCKE, ASSISTANT EXECUTIVE SECRETARY, SCREEN ACTORS' GUILD; AND MARY LEDDING, PRESIDENT, WOMEN-IN-FILM, MGM

Ms. GURIAN. Thank you, Mr. Chairman. And thank you all for allowing me to come to speak to you today.

I am the executive director of the Writers Guild of America West, and I represent approximately 6,200 writers who live west of the Mississippi and approximately 2,500 who live east of the Mississippi.

Because of the high rate of unemployment, most of them could not afford to travel to Washington to speak to you. Had they done so, they undoubtedly would be as uncomfortable in this chair as I am, because I am, for one of the rare moments in my union's history, allied with our traditional enemies, the producers. And the seat is very hot and very uncomfortable.

But the alliance is strong. The reason for this alliance is our perception, the writers' perception, of the need for the retention of the financial interest and syndication rules. These rules are the only garments that protect the writer out in that risky business of television. These rules enable writers from all over the country—the secretary in Duluth and the steelworker in Detroit—these rules enable them to aspire to become writers and to aspire to become part of the television business.

There are two reasons, essentially, why these rules work and work so well for us, the forgotten guys in this big economic battle we are part of. One of them is economic, but on our level. The right to retain some small piece of what we call the back end rights, the syndication rights, gives that writer the incentive to keep going in this business. It gives that writer the urge to stick with it through all the losing tough years, because eventually he or she may become the next Norman Lear or the next Steven Cannel or the next Steven Bothco.

That is the only incentive. That portion of the back end rights cannot be taken by the networks because of these rules, so they cannot be forced to give them up. That economic incentive is what keeps people all over the country trying to write for television and to write what their particular views are.

The second and critical reason that we need the retention of these rules is for the development of diversity in programing. Our hope is to improve the quality of television.

We represent in our 8,500 members Asians and Eskimos, blacks, Mexican-Americans, and writers of all shapes, size, and color. The difficulty of getting programing on that reflects their interest is a direct measurement of the way the networks view their public responsibility.

The talent unions—the Directors Guild, the Screen Actors' Guild, and the Writers Guild—have negotiated arduously and with great difficulty creative control provisions in their collective bargaining agreements. And these provisions in essence state: You, Mr. Producer, will have the creative control over the players and the writers and the directors that are making your program for you. We believe you should exercise that control because you are a member of the creative community.

The networks totally violate these provisions as a rule. They are not honored at all. The networks have arrogated unto themselves total creative control, under the rubric that they have a responsibility to the American public.

I submit to you that they may feel that they have a responsibility to the American public, perhaps to keep George Carlin's seven dirty words off the air, I do not know. But they certainly do not have a responsibility to choose day player A over day player B, or to choose a writer on that white list as opposed to all the host of writers out there who would like to get in to work for them.

I submit that they are confusing their responsibility to the public with a terrible sense of excessive creative control, motivated not by quality television but by advertising rates.

This problem has become so excessive in Hollywood that the three unions have gotten together and hired legal counsel and we are examining filing suit against the networks because of their refusal to honor our provisions relating to creative control, the provisions which exist in our collective bargaining agreements.

Under the situation as it exists in television today, the writer can go to a host of producers, some small, some large, and if he's very lucky he may find a producer who is at that particular moment in his life ready to take a gamble on an unusual program, a controversial program.

If only the three networks—if the three networks are the only employers in town and their interests are dictated by maximizing their advertising dollars, because that is what they sell, they sell air time, then the employment picture for our writers is depressed even further and their ability to get the unusual and controversial program on the air is minimized to where it is almost nonexistent.

I am sorry, I see I am running out of time, so I will make one point in conclusion. There has been a statement bandied about that the networks are afraid of competition from cable and pay TV. We work in this marketplace. We live in it every day. We know what a fallacy that is. Producers who produce in these markets come to the unions on a daily basis asking for waivers from even the smallest minimum that we have, because there is no economic base in this industry.

I submit to you that retention of the rules is necessary for each and every writer in the television business, and I urge you to support S. 1707.

Thank you.

[The statement follows:]

STATEMENT OF NAOMI GURIAN, EXECUTIVE DIRECTOR, WRITERS GUILD OF AMERICA

My name is Naomi Gurian. I am the Executive Director of the Writers Guild of America West and I represent our 6,200 writers who reside in and around the West Coast, and approximately 2,100 writers in our Eastern New York affiliate. These 8,300 writers are the struggling Norman Lears of today. These are the writer-entrepreneurs that the financial interest, syndication and prime time access rules currently protect. The rules create a nurturing environment within which young writers can grow and aspire to the position of a Norman Lear with Embassy Productions. The members of my Guild strongly support S. 1707. Quite frankly, we are frightened by the FCC's headlong rush to repeal their own recently adopted rules. A simple moratorium, during which time we can rationally assess changes occurring in this industry, will harm no one. FCC repeal of the rules, however, will devastate the members of my Guild from both a financial and creative point of view.

Without these rules there are no checks and balances to protect the small guy, the member of my union. Let me explain to you the two major ways in which this happens. First of all, economic; by allowing the small guy to have a financial interest in the back end rights to the programs he helps create, you provide him with an incentive to stay in this risky business as well as that modicum of bargaining leverage that is necessary to compete with the three network giants. Without this leverage, he has no hope of selling his ideas, and that leads me to the second most important part of my statement.

I believe that this Subcommittee wants to serve the public interest, and I believe you serve that goal by creating an environment which is conducive to the diversity of expression, which inevitably leads to new ideas and programs. If you remove the minimal controls the FCC established in 1970, you will stifle all diversity of expression. Even today, with the rules, a writer's creativity is impinged by network dominance. You must realize that to my Guild, the rules are the only mechanisms that prevent total network control of the creative process.

The talent unions in Hollywood, that is, the Screen Actor's Guild, the Directors' Guild, and the Writers' Guild, have, after hard and arduous sessions, negotiated provisions in their collective bargaining agreements with various production entities. The agreements reserve certain creative decisions to those production entities. Thus, the production entities are able to exercise creative discretion as to the nature of the script which eventually becomes the program America watches, the individual playing the principal role, and the individuals that we call the day player.

Today, these collective bargaining provisions give the producers certain vital creative controls. But we wage an ongoing battle against the pervasive and consistent network expansion over creative control. The struggle to protect our rights from network encroachment has reached such a level that the diverse talent unions have organized together and hired a law firm to examine potential legal action against expansion of network creative control.

If the networks acquire syndication rights or any financial interest in programs, they will surely impose their institutional creative biases on writers even more than they do today. You must remember that the networks are seeking to reach the lowest common denominator of American viewers to attract advertisers. In contrast, when a writer and a producer develop a program, the producer does not share the network's concern with pleasing advertisers and airing "safe" programs aimed at the collective tastes of television viewers across the nation.

With regard to minority programming, it could be on their air tomorrow if the networks permitted it. The only thing stopping them is their own profit maximizing motives. The Guild fights the networks by filing EEOC claims every day. Our thought is that if minorities have greater opportunities to work on scripts and behind the scenes, the viewing public will benefit by having more programs reflecting the minority way of life. The networks have opposed us at every juncture.

One network recently issued an edict prohibiting writers over 35 years old from participating in programs created for that network. They wanted all of their programming to interest only viewers between 18 and 35 because they are the predominant consumers of products advertised on the networks. Together with the production company, we have battled this unreasonable policy. I find their credibility ques-

tionable when the networks argue that repeal of these FCC rules will allow them to air more programming involving the elderly or ethnic minorities.

Fortunately for writers, the lowest common denominator mentality does not filter down to the producers we work with—creativity is encouraged, not discouraged. With the protections of the rules, writers and producers are more willing to push for fresh, innovative programming ideas. Even if we are only occasionally successful in getting such quality programs on the air, the viewing public is enriched.

Without the rules to provide financial and creative incentives for talented writers to stay in the television business, I genuinely fear that the overall quality of television will suffer.

I would like to address myself to another significant point. To the unions in Hollywood, it is ludicrous to hear the three network giant state that they are fearful about the competition from the growing cable-pay markets. The networks are effectively asking the FCC to protect them from the very competition the FCC has encouraged for years. The networks do not need protection from cable: rather cable, which is still in its embryonic stage, needs protection so that it can mature into healthy adulthood.

Right now, if the networks do not buy an idea, it goes into the wastebasket. There are stirrings of new opportunity in cable and pay-TV, but these are only distant hopes to our membership which suffers an unemployment rate approaching 60 percent.

Quite frankly, cable cannot afford writers of original programming under the terms of our collective bargaining agreements. To write for cable projects, we have had to secure special waivers on a case-by-case permitting us to get sub-standard pay for our work.

As a member of the industry which could be devastated by the FCC's headlong rush to repeal the rules, I am here to tell you that the "new media" revolution has not yet come, it is only beginning. The FCC's perception of a competitive new media is wrong, it is a distant and weak prospect.

A cable industry, that has done very little original programming and does not have the wherewithal to air original programming without reducing union wages, is not a threat to the networks. Writers and producers of quality series are not flocking to cable—they will continue to look to the networks as the forum for their product for many, many years to come.

In conclusion, this is not the time to repeal the financial interest, syndication or prime time access rules. The Writers Guild strongly urges the Senate to enact S. 1707. To provide the Subcommittee with additional support for the position that repeal would be harmful to the creativity and diversity of the guild members that I represent, I would like to submit, along with my testimony, the attached letters, speeches and Senate testimony prepared by guild members and submitted to the FCC.

Senator GOLDWATER. Thank you very much.

I did not mention that Ms. Gurian is of the Writers Guild of America, and the other two on the panel, Mr. John Sucke is assistant executive secretary of the Screen Actors Guild, and Ms. Mary Ledding, president of the Women-in-Film.

So let us keep up with the women.

Ms. LEDDING. Thank you, Mr. Chairman.

My name is Mary Ledding and I am president of the Los Angeles chapter of Women-in-Film, which is a professional women's organization for women in television and the motion picture industry. Well over half of our members work predominantly in television and over 300 are or have worked as producers.

It is clear to us that the FCC's financial interest and syndication rules have had a strong and beneficial impact on the number of women participating in the creative and production areas of this business. Our membership began with 12 women 10 years ago when the rules were promulgated and we are now over 800.

Many of our members work for companies who have prospered from syndication revenue or have only recently entered the syndi-

cation or production business because of the potential profits to be made.

If the rules are repealed, we feel many of these independent companies and producers will go out of business or be submerged within the networks, creating a loss of jobs for our members. And more important than the loss of jobs will be the loss of diversity of viewpoint and content which will result.

The more individuals in the competition for a television program production, the greater the potential for new and innovative programming. This is the premise on which the rules were promulgated, and I think it has been overlooked by the FCC in its rush to dismantle them. Instead, the FCC has vested its faith in the gods of statistics and economic studies, while totally ignoring the qualitative impact that these rules have.

The networks already control almost every aspect of a program—selection, development, scripting, casting and production. This tremendous amount of control which is vested in the hands of a handful of people to determine what will appear in the homes of millions of Americans is very limited, indeed.

If the network programming today does not adequately reflect the diversity of our population, it is not for want of trying. It is very difficult for a producer to push through anything other than the status quo.

For example, one of our Women-in-Film producer members who created one of the top 10 shows today on the air told me she had come up with an idea for a movie of the week and a series based on the life of a Mexican maid in Beverley Hills. It was an idea to examine the day to day dreams and problems of a woman and an ethnic minority member who, in a menial and thankless job, nonetheless had goals and aspirations.

When she pitched the idea the network response was quick: "Tacos do not get numbers." It is all the more devastating when you know that the response was from a network minority member himself.

The simple truth is that program selection at the networks is a numbers game, the numbers of ratings and audience share. They have always had the power to select programming that reflects varied points of view, but they do not pick them for fear that the mass audiences will not be interested.

For example, another producer member, a former network executive herself, easily quoted me some of the current network rules for program selection:

First, television audiences do not want to see TV shows that are centered around females.

Second, blacks do not work in TV. As an example, she showed me the "Crisis at Central High" movie of the week, which starred Joanne Woodward as a teacher in a predominantly black school. Because that show got low ratings, thereafter black-oriented projects were turned down at the networks.

Third, shows with senior citizens do not work, unless of course you have Fred Astaire or Betty Davis.

Fourth, topics or issues that are controversial or appeal to small audiences simply are not in the networks' best interest, unless of

course they are titillating or so-called sexually hot topics. To the networks, an empty record is the best record.

Women-in-Film believes that if the FCC repeals the financial interest and syndication rules the situation will only get worse. Even though the networks have final determination over the programs that are selected for airing, the rules through their economic incentive to producers have fostered the development of many new producers who bring their own taste and style to program content. These producers include companies like Lorimar, MTM, Embassy, and other independent producers, who affiliate with them and distinguish themselves with the creation of quality programs that audiences enjoy.

Repeal of the rules will mean that many small producers will be put out of business, because it will simply be more efficient for the networks to produce shows in-house, using writers, producers and directors that are staff employees rather than independent contractors. Many of our members, in fact, have already noticed an increase in the number of network programs that are being done in-house already in anticipation of repeal.

But if the rules are repealed and 50 independent development personnel, story editors and producers, go out of business or lose their jobs, it is the loss of 50 different points of view as well. It is this diversity of approach and outlook that allows for creativity and quality in programing.

Repeal would mean that independent producers will be rendered mere employees, carrying out network-dictated, content guidelines and concepts—team players carrying out team rules such as the ones I mentioned earlier. The independent thinker in a network bureaucracy will not fit in with corporate mentality or corporate goals.

The financial interest and syndication rules allow producers economic rewards for their efforts in the form of profits and program ownership. They are the method by which small producers in a business dominated by three giants can realize the American dream of economic success in return for hard work and risk taking. If they are repealed, no one who does daily business with the network is fooled into believing that producers will be allowed to keep anything but a very small percentage of the profits.

Yet there is a strong correlation between the profit incentive and the creative process. Independent producers fight for their show, their cast, their star, their script. Those I have spoken with say they go to battle regularly with the networks over casting, script content, and the selection of writers and directors, because they feel the need to create the best possible program, which in turn will create their most profitable product in syndication.

To allow the FCC to repeal the financial interest and syndication rules is to permit the networks, with their vast resources, to have total freedom and control of content, cost, production, distribution, and ownership of television programing. It will silence the small independent voices of producers who might otherwise become the Norman Lears, or Norma Lears, of tomorrow, serving up diverse and varied fare for the public to enjoy.

S. 1707, aptly named the Competition in Television Production Act, will maintain diversity of viewpoint in television production, and I respectfully urge you to support it.

Now, Mr. Chairman, with your permission, I have submitted for *the record women*-in-film's filings with the FCC on this issue, as well as some excerpts from the March 14, 1983 panel at the FCC at which I spoke. At that panel several of the FCC Commissioners expressed dismay over the scare tactics that the networks apparently used in persuading some of the public interest groups that free TV was in danger of loss as a result of the—unless these rules were repealed. And I think you may find that excerpt of interest.

Thank you.

Senator GOLDWATER. They will be made a part of the record by reference and retained in our files.

Now we have Mr. John Sucke. Is that the correct pronunciation?

Mr. SUCKE. It has been pronounced so many ways, I do not think there is any correct pronunciation any more, but it is "Sucke." That is the way the family refers to it.

Senator GOLDWATER. Executive secretary of the Screen Actors' Guild. That is the first time I ever knew the President of the United States, was when he was president of that outfit. And, peculiarly, his political beliefs were quite a bit different than they are today, so the guild had a good effect on him.

You may proceed.

Mr. SUCKE. Thank you very much. Mr. Chairman and members of the subcommittee:

I am John Sucke from the Screen Actors' Guild, New York branch. Our union's nationwide membership is 52,000. We have branches in Los Angeles, New York, Chicago, Boston, Philadelphia, Detroit, Nashville, Atlanta, Miami, Houston, Dallas, Denver, Phoenix, San Diego, San Francisco, and Washington, D.C. It is our members who perform the vast majority of roles in the programs which would be directly affected by the changes in the financial interest and syndication rules.

We are firmly against the FCC's proposed changes in the rules and strongly favor the bill postponing the consideration of the changes. Our position is based on the traditional support by artists of freedom of expression for individuals and minorities, and on our past and present experiences with the networks themselves.

Over the years we feel the FCC regulations had the effect of creating an oligopoly of three networks in this country and they control the electronic communications industry. Now they want more power. They want to be able to make even more money from the distribution of programs which are run on their facilities.

I submit that all the reasons that originally led to the promulgation of the financial interest and syndication rules still exist today, every one of them. The network oligopoly still totally dominates program distribution.

Our members, the actors, have experienced the power of the networks firsthand. They have seen casting choices being made not on the basis of the talent of the individual performer, but on the basis of the so-called cue rating. This is a system by which the networks supposedly judge how well known and how trusted a particular performer is in the mind of the public.

The obvious effect of this is a feedback cycle. If the public has seen a performer so much that it recognizes that person by name, and if he or she has played the right roles, engendering trust, then the public will see that performer again and again and again on show after show until the cue rating changes.

Of course, the networks deny that they use this system. But our experience from looking at television and from talking to these performers and their agents is otherwise.

Only last year one of the networks officially announced that it was discontinuing use of another system that they believed to judge the success probability of any proposed television series by looking at the ethnicity, gender and economic orientation of the leading roles in the series. We are gratified that they no longer use it and hope the other networks do not use it either. But why was such a system even considered?

We believe the public deserves far more than the oligopoly can produce. The public deserves a multiplicity of producers and independent stations, all producing programing reflecting the vast varieties of experience available in our heterogeneous culture.

In 1972 there were 73 independent stations telecasting in this country. Today there are 179 such stations. We believe that growth is directly linked to the financial interest and syndication rules themselves. Many of these stations have built their audiences by running a core of syndicated shows.

The networks are businesses. They will behave in their own interest in every legal way possible. Now, why should they help their competitors if they can avoid it? It seems to me as simple and as effective as that. Independent stations are competing with network stations. By softening the rules, the networks will have more influence and control over their competition.

The independent production company today has a very difficult economic situation. The fees the networks pay for shows rarely cover the cost of producing them. In some cases, like Hill Street Blues, for example, the company incurs a deficit in the production of the original show. So the company hopes to recoup the loss through syndication and foreign licensing. And now the networks want part of that syndication fee, even though they get all the advertising revenues from the commercials which run on the show originally.

It does not take an economist to realize that restricting the amount of potential profit available to an independent producer is likely to diminish the number of such producers willing to take any risk in the first place.

Imagine the devastating impact on the producer whose show is even a bit outside the networks' concept of mainstream appeal.

Why do the networks need this income? They say they deserve it because cable television has cut into their audiences, because their share of the advertising dollar is eroding and because they will use the money to improve program quality. These arguments may sound plausible but we believe they are specious.

First, we believe that the networks are not losing audience. In fact, they have more individual viewers today than ever. What has dropped is their "share" or the percentage of all viewers watching them at any one time. We believe the reasons viewers choose to

watch other fare are rooted in the network programing decision, decisions criticized previously. This problem will not be solved with more money.

As for their share of the advertising dollar, this argument contains a faulty assumption. It is simply untrue that advertising dollars are constant. Advertisers want exposure to as many people as possible. Commercial network television is still in a better position to supply that need than any other medium. We do not see that pattern changing significantly in the next 5 years.

Turning to the networks' claim that they will use the additional money to improve the program quality and diversity, let me ask a simple question, why are they not doing it today? These new revenues the networks desire are more likely to go into the new technologies they wish to control rather than to new, better programing. They are, after all, broadcasters.

In conclusion, let me emphasize that since our members are performers they are experts at judging what the public wants. We believe the public does not want more power concentrated in the alphabet oligopoly of ABC, CBS and NBC. Deregulation may be a rallying cry today but it is usually applicable in situations where Government regulations are inhibiting free competition. In this case, modifying the financial interest and syndications rules would have the opposite effect. Instead of promoting competition it would reduce it. The oligopoly would grow even stronger at the expense of all.

The networks are not in any financial trouble. Revenues and profits are high. It is in the interest of the public to delay the rule changes for at least 5 years.

Thank you.

Senator GOLDWATER. Thank you very much.

Do you have some questions?

The CHAIRMAN. I do, Mr. Chairman.

I want to ask first, Ms. Gurian and Ms. Ledding—Ms. Ledding, you indicated that you testified in March before the FCC, is that right?

Ms. LEDDING. Yes.

The CHAIRMAN. Did you also, Ms. Gurian?

Ms. GURIAN. Yes, I did.

The CHAIRMAN. One of you used the expression, rushing to judgment on the rules. The other had a similar if not identical statement. How long do you think administrative agencies should spend before they finally make a decision?

Ms. GURIAN. I do not think it is a factor of time, Senator. I think it is a factor of the quality of the inquiry. In this instance, with all due respect, I do not believe the Senate is in show business, although I have heard comments to the contrary, and I do not think the FCC is, either.

From our writers' point of view, and I know I speak for the actors and the women in film and the directors as well, you just do not understand the pay TV market and you do not understand the great disparity in bargaining power between the networks and the producers.

The CHAIRMAN. If they do not understand that, should they ever be allowed to make a decision on it? Should they have ever been

allowed to make the decision in 1970 in that case, if they do not understand it?

Ms. GURIAN. I certainly am not qualified to tell you whether they should have been allowed to make the decision. It happens that it has worked and worked well since 1970. I think that alone is reason to let the rule stand.

The CHAIRMAN. I asked this question of most of the other witnesses: Did any of them claim that they did not have a chance to appear and testify either before the FCC, or in most cases they also testified before the special staff inquiry that started early in 1978? I have not found any witnesses yet that said they were denied an opportunity to be heard. Were you?

Ms. GURIAN. No.

Ms. LEDDING. May I respond to that?

The CHAIRMAN. Yes.

Ms. LEDDING. I think the feeling was that everyone is aware that the FCC did follow the letter of the law in terms of administrative hearings. However, I believe that in view of the magnitude of the issue before it, there was a feeling, particularly in March, for example, that there was not adequate time to prepare, there was not adequate notice in terms of being able to read and digest the material, the voluminous material that had been filed at the FCC. The hearings were called very shortly after the deadline for submittal of material, so that you could not digest what had been presented and therefore respond to arguments that were made or could be questioned.

It was strictly a panel set up to hear the very same things everyone had already filed, rather than get to the issues that were laid on the table.

The CHAIRMAN. Would you be making those same comments if the FCC had decided in your favor?

Ms. LEDDING. Undoubtedly I would not be asked to make those comments. It would not be an issue.

The CHAIRMAN. My hunch is that the networks would be here making the same comments.

Ms. LEDDING. Yes, the networks would be making those comments.

The CHAIRMAN. This really started in 1977 when they issued their first notice of inquiry. In 1978 Congress appropriated $2 million for the special staff inquiry. They spent 4 weeks in Los Angeles talking to everybody they could find, hearings in New York, hearings here. The Federal Trade Commission did its own separate hearings. It has been 6 years from the time the first suggestion of inquiry started.

I guess my question is, How long do we go before you make a final judgment?

Ms. LEDDING. Let me also respond. I know the inquiry that began in 1977—for example, Women-in-Film was never made aware of that inquiry or approached. I am not in a position to comment about other studios or producers, but I do know, for example, that question was posed to Mel Blumenthal at one point in one of our meetings with one of the Senators and his response was no—and he is an officer of MTM Productions—no, we were not adequately involved in that issue.

The CHAIRMAN. In 1977 they did not have hearings. That is when they issued their first notice of inquiry, and then the special staff study took 2 years and $2 million.

Ms. LEDDING. The staff study is what I am speaking about.

The CHAIRMAN. I did not find anybody, even including when I asked Mr. Blumenthal and Ms. Moore and Mr. Lear yesterday, had they ever been denied an opportunity to appear. I have not found anybody that said they did not get to say their two bits worth. I found lots of people who do not like the conclusions, but not that they were denied a chance.

You do not need to respond to that any further. I want to shift to a different subject.

Are you familiar with the way new productions are financed, any of you?

Ms. LEDDING. I did not hear the question. What kind of productions?

The CHAIRMAN. The way new shows on television are financed.

Ms. LEDDING. Yes.

The CHAIRMAN. Are any of you familiar?

Ms. GURIAN. Yes.

Mr. SUCKE. Generally, yes.

The CHAIRMAN. Do the independent producers—and there is a conflict of testimony on this. Do the independent producers on their own borrow the money from someplace, prepare the scripts, prepare the pilots, take it to the networks, and show it to them, without the networks investing any money or without any go-ahead from the networks, taking a chance that they will be able to sell the show to the networks?

Ms. GURIAN. Very seldom, Senator.

The CHAIRMAN. What is the common method of starting a new show in terms of financing?

Ms. GURIAN. The common method of starting a new show in terms of financing is to take the script or the package—that is, the script, the star—to the network. Before the script is written, there will be an outline or a presentation and they will get a go-ahead from the network, and it is a step go-ahead: You may go to script.

Then if the network approves the script——

The CHAIRMAN. At this stage who is paying for the expenses?

Ms. GURIAN. The network.

The CHAIRMAN. From the start of the script. OK, go ahead.

Ms. GURIAN. It is from the treatment or the format, that is correct. They customarily pay for that.

And then if they like the script—that is, after all of the revisions are done—they give the order to go to pilot.

The CHAIRMAN. And who pays for that?

Ms. GURIAN. I believe the networks pay. But once again, I think pilots are sometimes deficit financed. I cannot tell you the extent of the deficit financing.

The CHAIRMAN. Then what happens.

Ms. GURIAN. Following the pilots, the networks either order a series or do not, and those orders can range from one or two scripts to today maybe six or nine.

The CHAIRMAN. And at the stage where the network says go ahead and produce six or nine, who pays for that?

Ms. GURIAN. They pay in part.

The CHAIRMAN. If they have put all this money up, and forgetting syndication, why should they not be allowed to have some financial interest?

Ms. GURIAN. They need no financial interest because of the way they maximize the advertising time on one and customarily two showings of that program.

The CHAIRMAN. It is not a question of need. Why, as a matter of equity, if they are the ones that have put the risk capital up, should they not be entitled to some of the financial reward from what they have invested in?

Ms. GURIAN. They are entitled to financial reward. Nobody is denying that and nobody is denying financial reward to either side, either to the producers or to the networks. What is not viewed here is the sharing of the risks. The networks claim that they bear all of the risks. They do not.

Producers bear their own share of the risks. But because of their uneven bargaining power with the networks, they do not have an opportunity to recover.

The CHAIRMAN. A statement later on is going to come from Mr. Londener, who is an investment analyst—I will read what he says:

"With Wertheim & Company, a New York-based investment banking and brokerage firm, and for over 15 years I have specialized in the analysis of the entertainment industry. I analyze the stocks in the broadcasting, motion picture, cable television and others in order to provide investment advice to our clients, who are principally institutional investors.

I do not represent a constituency at these hearings, and our clients own securities of companies on all sides of the issues.

He comes down against the networks on syndication because he fears that the power to syndicate would tilt too much toward their affiliates. But as far as financial interest, he says as follows:

In original series the networks pay for substantially all the costs of production. Some shows are deficitly financed by the studio or production company, but the budget usually includes heavy overhead charges for the studio, the non-network revenue stream nearly always includes immediate foreign television sales, and there is an investment tax credit available to the owners of the product, which altogether usually produce a breakeven or profit immediately. Since the networks fund the production outlays with advances, the studios typically do not have meaningful cash outlays themselves.

Is that an accurate statement?

Ms. GURIAN. You are not asking an expert, but my understanding is that it is totally inaccurate.

The CHAIRMAN. All right. That is what I wanted to know.

Ms. LEDDING. Might I respond to that as well?

The CHAIRMAN. Yes.

Ms. LEDDING. I agree with Naomi, I think it is inaccurate. In many cases studios will, because they want to get that network order, will expend thousands of dollars in terms of making the pilot episode or the presentation tape, whatever it is, perfect, because so much is riding on a series pickup.

One other thing that I would comment on. I think the statement was made that the costs are covered by immediate foreign sales. In many cases you will not have a product that is salable abroad. If you have one-half hour pilot, nobody is going to buy it abroad.

The CHAIRMAN. That is all I wanted to find out, is that you disagree with Mr. Londener. He will be coming on later, but he is one of the few witnesses we have testifying that has no financial stake in this one way or the other, and who recommends stock of both sides, both of the movie companies and the networks, for his clients to buy, and comes at this at least not influenced by any possible gain one way or the other for himself, for the advice he gives.

Let me ask another question now. In my opening statement I said I am principally concerned about the quality of television that the American public is going to get. Are the networks going to put on any shows, whether they produce them or you produce them or write for them, independent producers or otherwise, are they going to put on any shows that they at the start think are going to fail?

Ms. LEDDING. I think not.

The CHAIRMAN. Regardless of who produces them.

Ms. LEDDING. Everyone wants to make a successful show.

The CHAIRMAN. And they are going to try to put on shows—excuse me. My time is up, but I will come back to that. Go ahead.

Senator GOLDWATER. Senator Gorton.

Senator GORTON. No questions.

Senator GOLDWATER. Senator Wilson, do you have any questions?

Senator WILSON. Mr. Chairman, I apologize for arriving late. I was just trying to read Ms. Gurian's testimony, but I see that it is her view, representing writers, that the present rules are a needed protection. And I gather that you feel that they are a needed protection to the great number of writers whom you represent because of the fact that without these rules there would not be the same opportunity for writers; is that correct?

Ms. GURIAN. That is correct.

Senator WILSON. And the presentations that we heard last week, which you did not hear, made essentially the same point, if the point is that there is both actual control of market and therefore creative control.

Ms. GURIAN. That is precisely how it exists, Senator. It is not a measure of the financial resources of MCA versus CBS. That is not a relevant figure. It is not a relevant fact.

The fact is that the three witches control all television that is relevant, and you must make a sale to one of those three. As the situation exists now, there is a vast buffer zone of 100, 200 independent producers, from the very small to the very large. That buffer zone, those people are all in the creative community, and amongst one or the other you can usually find someone who will push for your script if it is controversial, if it contains minority characters in lead roles, and the like.

You cannot do that at the network because their interests are totally different. They are not interested in the program that is of interest to a small audience, but in a program that is of interest to the entire Nation, and they program to the lowest common denominator.

They have yanked some of the best shows off of television, "The Senator," for example.

Senator WILSON. Just to pick one at random.

Mr. Sucke, is that essentially your point in representing the Screen Actors' Guild?

Mr. SUCKE. Well, yes; we feel that diversity is what is needed and what is not very evident today on the television screen, that the working of the rules—we are just starting to see the results of what we consider to be a long-term experiment, and we hope it will be much longer. You see something like Operation Prime Time producing programs like "A Woman Called Golda" or "Sadat," where casting choices that are unusual on the network and subjects that are not quite the norm are starting to appear.

Now, I do not by any means suggest that everything that is produced by independent stations is wonderful fare and contrasts sharply. But you start seeing developments and we hope they become trends. Without the rules you would not see them at all.

Senator WILSON. Ms. Ledding, you represent a different constituency. Your interest is that your constituents either are or would be producers, and I gather that you feel that the limitation of networks, about which Ms. Gurian and Mr. Sucke are concerned, affects opportunities for your constituents to become, or at least expand their activities as, producers.

Ms. LEDDING. That is true; yes.

If I might add one thing that I think is important, the fact that the networks are not allowed to own programing today is beneficial in terms of subsequent life for programing in new media. We have seen in the last few years a number of situations where, had the networks controlled such shows as "Taxi," "Fame," and other programs, "Paper Chase," for example, they would have seen a network run, they would have been canceled and put on the shelf. There would have been no need or desire to see those shows come again in a new media.

And now we have seen "Fame" resurrected, doing very well made for syndication, through an alliance of studio and independent stations. We have seen "Paper Chase," go from the network airing on to PBS and syndication, where it reached a different market, and now it is being produced for Showtime direct for cable.

The network has enough money to have bought up those rights, put them on the shelf, and left them there to gather dust. The network has already, the various networks have, bought up personalities and have exclusive contracts and put them on the shelf, in large part because they would just as soon keep them off the other networks' shows.

There was a recent article, not too long ago, in the L.A. Times that documented the kind of exclusive deals the networks have the money to buy with artists, and there is no reason to expect that they would not do the same with material.

Senator WILSON. Have you entered that article from the Los Angeles Times into the record?

Ms. LEDDING. I have not, but I will do so if need be. The CPD has it in their files.

Senator WILSON. I gather, Ms. Gurian, you think the essential point is not the size of these conflicting conglomerates, whether it is MCA versus RCA, but as you point out, the contest is unequal precisely because there are only three networks?

Ms. GURIAN. That is correct.

Senator WILSON. If you do not get on one of those, you are not on.

Ms. GURIAN. That is right. For all of MCA's assets, it cannot make itself a fourth network.

Senator WILSON. Thank you, Mr. Chairman.

Senator GOLDWATER. Thank you.

Let me see if I can make something straight that we have not been talking too much about. I said the other day that the networks have to make money in order to stay in business. Well, take as an example, in the advertising field they are willing to pay, for example, the National Football League, I do not know whether it is $200 million or $400 million just for the rights to broadcast that game. And that money supposedly goes to the different teams in the National Football League.

The networks would not buy that, they would not pay that kind of money, if they were not sure they could sell Goodyear, Ford, Monkeywrench, and everybody else that buys the time. They would not buy it unless they knew they could sell it, is that right?

Ms. GURIAN. Correct.

Senator GOLDWATER. All right. Now, that is the same way with your programs. You go to a network with an idea, not a script, nothing, just an idea. And they toss it around and decide, oh, this thing can make money. I am thinking of "Archie Bunker."

I do not think anybody in their right mind would have bought that unless they felt that they could sell it. And they felt they could sell it and it has become one of the biggest programs in American history. The same way with "MASH." Now, they made money off that.

And my own feeling is that if you sell something that you have created and they can make money off of it over and above what they pay you, you should have some right to participate in that share of the profit. Do you agree with that?

Ms. GURIAN. Absolutely; I agree with it.

Senator GOLDWATER. I think that is most of what this whole argument is about. Now, the networks argue that without repeal of the rules they will be in dire financial straits. They suggest that without repeal advertiser-supported television will become the junk market and all quality entertainment will shift to cable.

Any of you can answer this: How do you all feel about those predictions?

Ms. GURIAN. I think that is just a lot of rot. It is just not the reality of the pay cable scene. In the first place, there is tremendous churn in pay TV. You pay for a pay channel, you do not want to see commercials, you want to see movies. So they are not going to sell to advertisers. And the basic cable market is struggling like no other market I have seen in recent years.

They came to us—there is a producer, that lone individual, who came to us and said, look, I have got a chance to sell seven 1-minute shows to a cable company, and then I want to market it to several others and I have to do the marketing myself, but your minimum for the writer is too high at $641. And I said, well, before I take it to the board of directors, can you show me your budget? He showed me a budget that was mind-boggling, and we reduced the minimum to $120.

These are the figures that are real, gentlemen. This is not an industry that now or in the foreseeable future is going to challenge

network profits. Cable companies are dropping out. The cost of wiring the Nation is extraordinary. This is not a challenge to the networks today.

Mr. SUCKE. I would add, if I might, that when we negotiate with the producers and the networks they are constantly telling us that they do not really know what the basic cable industry is, they do not even know if such an industry exists, because it is too new, it is too unformed. Nobody knows how they can make money out of it. They do not even know if they should still be in the business.

And as far as pay television is concerned, there is one company that is making money out of it, HBO, Time Inc. Everybody else is hoping to make money out of it. How you can take those hopes and those uncertainties and project into the future the end of free television as a viable market is beyond me.

Senator GOLDWATER. Do you have a comment?

Ms. LEDDING. I agree with their comments. I think that 13 years ago when I was in school, at that time our professors were telling me, cable is the wave of the future and it is going to be here and everyone is going to be wired. And now it is 13 years later and we are still seeing 3 to 5 percent of the market to cable, which is very small.

I think that the likelihood that quality programing will all of a sudden find its way to cable is extremely unlikely, now or even within 5 years.

Senator GOLDWATER. Well, I personally believe that this sort of fear of the future is unwarranted, because cable is having a hard time. Satellite is around the corner, but you are the folks that have to produce in order to have any of those media work. That is what we are really getting down to.

Now, another question. Would you care to discuss why it might be any better or any worse for an actor or a writer to be an employee of a network rather than an employee of a major studio? Any one of you?

Mr. SUCKE. Well, let me take that, for a while anyway. Ironically, I suppose, an actor would be happy to be an employee of just about anybody. We have 80 percent unemployment all the time. So for an actor to find himself in an employed position is just a stroke of great good fortune.

As far as the quality of the employment, I think that is where the answer lies. Picture the actor's position. Is it better for him to have to go and make his rounds, as we say in New York, to 3 companies or 150 companies? What are his chances? What is the chance that three companies will come up with the kind of interesting role, the kind of situation where the actor will not be too tall, too short, too old, too dark, too white, too what have you, to fit the part, as opposed to the diversity of companies?

I think as far as the actor himself is concerned or herself is concerned, the chances are much better with a multiplicity rather than the three.

Ms. GURIAN. May I speak about writers very briefly, Senator?

Senator GOLDWATER. Yes, sure.

Ms. GURIAN. A writer who works directly for the network is told what to write and how to write it. The person telling him is not interested, by the very nature of his business, in the creativity of

the program, in the quality of the programing. He would like those, I am sure, if they came along with the right costs. But that is not his aim.

However, if the writer worked for a producer the aim is quality. We may not always get it on, but the aim is there. That is a huge difference for writers and authors.

Ms. LEDDING. If I could just add to that, of all the producer members which I spoke to who are members of Women-in-Film, I raised the question at times, what is the difference between working for Columbia Studios versus NBC? In all cases without exception they said, I would rather work for Columbia if I had to work for anything, and I would rather work for a studio than a network, because they are the creative side and the networks are the business side.

And it is productive and beneficial for the two sides to be in a conflict situation, to fight it out and make the best possible programing.

Senator GOLDWATER. Thank you.

How do the FCC rules foster more frequent and realistic roles for women and minorities in the television industry?

Ms. GURIAN. Senator, they do not. I am afraid that on that issue both sides are dreadful, and I do not think the rules have any particular effect on the abysmal picture of minorities hired and women.

Ms. LEDDING. I might disagree with Naomi, because I do think that with the rules in place the number of shops in town, just as I said in my testimony, the number of places that need people to work, are greater. If the rules are repealed, I think that many smaller companies will go out of business, and those companies employ women, be it in a development capacity, as a story editor, or a producer or director or whatever.

So I think that they are more beneficial and that there is just more places to work.

Mr. SUCKE. My own feeling is that they are only slightly beneficial, but again, the argument about multiplicity rather than three major companies. The chances of finding more creative use of minorities and women are just greater when you have more people making the effort.

But I could not point with pride to either side and say, look, this is a brilliant example of looking to use minorities or women.

Senator GOLDWATER. Thank you. My time has expired.

I would just like to get into the record that the ratings of HBO, which we hear a lot of as a profitmaking enterprise, are dropping. Nielsen shows that HBO fell 22 percent in June of this year, and this year fell below the rating of June of last year. So things are not too copacetic in that area.

Robert?

The CHAIRMAN. I want to go back again to how these shows finally get on television, whether or not they are produced by the networks or produced independently. As I understand, roughly—forgetting for the moment who finances it, a producer goes with a script—maybe the networks paid some money to have the script written and maybe not—or an idea. And the network says, it seems

all right, go back and flesh it out a little bit and let us take a look at it.

Would that be a rough first step?

Ms. LEDDING. Sometimes.

The CHAIRMAN. Maybe the network calls the producer and says, we are thinking of the following kind of show, give us your ideas.

Ms. GURIAN. That is right. We want an "A-Team" in Hawaii.

The CHAIRMAN. Whatever, all right. So the producer comes with at least a sketch of an idea, maybe a script. And clearly, the networks may be putting up the additional money, but nobody has stuck their neck out very far yet, and the network is not going to stick their neck out very far on anything, whether they produce it, I assume, or independently produced, unless they think they can make money on it. They are not in the business of charity.

Ms. GURIAN. Except in an odd way, Senator. Many network executives include in their contracts that golden parachute clause, so that when they leave the network they go into business as independent producers. But they have something many producers do not have, and that is guaranteed on-air time.

The CHAIRMAN. I heard that contract explained yesterday with one of the people that testified for the producers who apparently had that kind of a contract when he left ABC. Golden parachute contracts are not unknown in a variety of businesses.

But I want to come back to the television networks' decision to finally put something on. Are they going to put—I think we agreed, they are not going to put something on that they fear is going to lose money, whether you produce it or they produce it.

Ms. LEDDING. That is right, I agree with you.

Ms. GURIAN. They are not in the business to lose money.

The CHAIRMAN. No; I know they are not in the business of losing money. They are hoping, as Senator Goldwater said, that it is going to produce advertising revenues.

Now, if they are not going to put anything on that they think is going to lose money or, translated, that the public is going to turn thumbs-down on, what difference does it make in terms of the kind of show that gets on the air whether it is produced outside or inside the network, if the networks' standard for whether or not they put the show on is the same standard: Can we take a chance with this show? Will it make money?

Ms. GURIAN. Well, I think you are talking about black and white issues, when in truth the reality is shades of gray. The network standards from our writers' point of view, while they are narrow, there is some room in there. The network standard, if it functioned in the way you are stating, all we would see on television would be daytime soaps, because they are very cost effective. They cost little to produce and the advertising revenue is great versus the cost of production.

So that there is some movement in that standard and it is in that area that the difference occurs, and that is where you need the independent producer.

The CHAIRMAN. I do not follow. I hear what you are saying, but I do not follow. If the networks have given the producer the idea and if the networks said, give us a script and these are the bounds we are looking at, I do not see how you get anything different.

Ms. LEDDING. If I might address the issue, because I did speak—part of the Women-in-Film's filing was a survey of women producers, many of whom had been network employees themselves. I was very interested to hear their comments, because they were on both sides of the fence. And they said to me: I know what it is like at the network and that is the bandwagon mentality. It is "A-Team in Hawaii," or Scandinavia or wherever you want to place it. Once there is one hit show, everybody jumps on the same bandwagon. And they felt very strongly that their creativity as an employee is limited by the numbers game, and that you are looking for a show for the 8 o'clock hour that is going to go up against the competition.

They said, we will all become automatons, in effect, of whatever the network's dictate is for that day, whereas their independence as independent producers would lead to innovative programing which they could fight for and insist that it get on.

It is sort of like the competition between the executive branch and the Senate. There is a benefit in conflict in that hopefully the best will rise to the top.

The CHAIRMAN. Let me switch to another subject. Ms. Gurian, those of us in politics frequently read statements prepared for us by staff or writers. So before I proceed any further, I want to know, did you write your own statement?

Ms. GURIAN. Yes; I did. It is in handwriting.

The CHAIRMAN. But the statement we have before us, did you write?

Ms. GURIAN. Yes; I did. That is a compilation of statements of mine which were before the FCC and before a congressional committee.

The CHAIRMAN. But you stand behind what is in here and you know what is in here?

Ms. GURIAN. Oh, certainly.

The CHAIRMAN. I am very curious about one statement—and I want you to tell me what you know. You say: "One network recently issued an edict prohibiting writers over 35 years old from participating in programs created for that network." That is charging some network with violating the criminal laws of the United States.

I want to know what network that was and what edict that was.

Ms. GURIAN. I do not know if "edict" is the correct term. The network was CBS. The program developer made it very clear that he was not interested in interviewing writers over 35.

The CHAIRMAN. Who is the program developer?

Ms. GURIAN. I am afraid I cannot tell you that.

The CHAIRMAN. But you are making the charge that CBS is consciously and deliberately violating the criminal statutes of the United States by some kind of policy edict or otherwise that writers over 35 are not to be hired.

Ms. GURIAN. Senator, following that statement, but actually following the occurrence of the event, the Writers Guild, the Directors Guild and the Screen Actors' Guild called for meetings with CBS and we had a series of meetings to deal with problems of what we considered to be excessive creative control. That is, the age of the writer, the selection of day players and the like.

Those meetings to date have not been fruitful. But during those meetings CBS said they were no longer following that policy, if indeed it was their policy.

What we know is on a much lower level than the executives. We know the people that the writers go to pitch to, and that is what was told them.

The CHAIRMAN. I am curious. You made that same statement before the FCC.

Ms. GURIAN. Correct.

The CHAIRMAN. Did you have any exchange at that time with CBS about the correctness of that statement?

Ms. GURIAN. Yes, indeed. They said that it was inappropriate to say that it was a network policy.

The CHAIRMAN. What else did they say?

Ms. GURIAN. I do not recall what he said.

The CHAIRMAN. But you still stand behind that statement today?

Ms. GURIAN. That it was made, of course it was made.

The CHAIRMAN. You said "recently issued an edict." I asked you if you had written this and if you knew what is in it. And I assume "recently" means relatively recently.

Ms. GURIAN. It is referring to the same statement I made before the FCC, so it is probably 6 months.

The CHAIRMAN. But you still stand behind that statement that at that time, because the statute of limitations has not run, at that time they had an edict or a policy against hiring those over 35 for writers?

Ms. GURIAN. That is what was stated, that is correct.

The CHAIRMAN. Thank you.

[The following information was subsequently received for the record:]

CBS INC.,
New York, N.Y., November 10, 1983.

Hon. BARRY M. GOLDWATER,
U.S. Senate,
Washington, D.C.

DEAR SENATOR GOLDWATER: On November 4, 1983, Ms. Naomi Gurian, Executive Director, Writers Guild of America, appeared before the Telecommunications Subcommittee of the Committee on Commerce, Science and Transportation to present testimony on S. 1707. On page 3 of her prepared statement, Ms. Gurian said:

"One network recently issued an edict prohibiting writers over 35 years old from participating in programs created for that network."

In response to a question from Senator Packwood, Ms. Gurian identified CBS as the network which had allegedly issued this "edict".

Ms. Gurian's statement is false, and she knows it.

In the first place, CBS does not now have, nor has it ever had, a policy of discriminating against writers over the age of 35. More importantly, however, when Ms. Gurian first made this charge (before the Federal Communications Commission of March 14, 1983) I asked Ms. Gurian for the basis of her statement. Not only did she not disclose any basis for her claim, but conceded that CBS personnel in positions of authority had told her that no such policy existed. Subsequently, I write Ms. Gurian on May 12, 1983, to reiterate that it was not CBS's policy or practice to discriminate against writers over the age of 35. I also went her a list of 85 writers currently working with or for CBS on programs for this season, all of whom are over 35 years of age. Ms. Gurian has never responded to my original letter or a followup letter which was sent to her on July 27, 1983. Copies of this correspondence with attachments are enclosed herewith for inserting in the hearing record. It is apparent that Ms. Gurian has chosen simply to ignore my correspondence and continues to make her unfounded accusation which she knows to be false.

As noted in the enclosed correspondence, CBS takes seriously its responsibility not to discriminate on the basis of race, color, religion, sex or age.

CBS hereby respectfully requests that this letter along with the enclosed copies of correspondence from CBS to Ms. Gurian be placed in the hearing record so that the Subcommittee is not further misled by Ms. Gurian's remarks.

Respectfully submitted.

GEORGE VRADENBURG III,
Vice President and Deputy General Counsel.

CBS INC.
New York, N.Y., July 27, 1983.

Ms. NAOMI GURIAN,
c/o Writers Guild of America West,
8955 Beverly Blvd.,
Los Angeles, CA.

DEAR Ms. GURIAN: I note with some astonishment that you have continued to charge publically that CBS has a policy of discriminating against writers over 35. That charge is wrong, and you know it.

I enclose my letter to you of May 12 as a reminder.

Very truly yours,

GEORGE VRADENBURG III,
Vice President and Deputy General Counsel.

Enclosures.

CBS INC.
New York, N.Y., May 12, 1983.

Ms. NAOMI GURIAN,
c/o Writers Guild of America West,
8955 Beverly Blvd.,
Los Angeles, CA.

DEAR Ms. GURIAN: You may recall that we spoke immediately after you testified at the Federal Communications Commission on March 14 regarding the financial interest and syndication rules.

You testified that CBS had a policy of not hiring and/or not approving writers over 35 years of age. When I asked about the basis of your testimony, you indicated that you had spoken with someone at CBS, whom you declined to identify. I asked whether you had spoken either to Bud Grant (President, CBS Entertainment Division) or to Harvey Shephard (Vice President, Programming, CBS Entertainment Division), who would certainly be in the best position of knowing CBS's policy and practice. You said that you had spoken to Bud and that he said that is was not CBS's policy or practice to discriminate against over-35 writers.

I have now verified (a) that what you described as CBS's policy is not CBS's policy or practice and (b) that Bud Grant told you that. I have gone further and identified numerous examples of writers over 35 employed by CBS and supplier-hired writers over 35 approved by CBS. (A list of such writers is attached.)

CBS takes seriously its responsibility not to discrimination on the basis of race, color, religion, sex or age. If you have any basis for your claim to the FCC, I want to know of it. If you do not, I think you owe us a response to that effect. In either event, I would appreciate a response to this letter.

Very truly yours,

GEORGE VRADENBURG III,
Vice President and Deputy General Counsel.

Senator GOLDWATER. Senator Wilson.

Senator WILSON. Mr. Chairman, I think we should allow other witnesses to get before us. I am grateful for these witnesses.

Senator GOLDWATER. Thank you very, very much for your testimony.

The next panel: Mr. Richard DeAngelis, vice president and general manager of KPHO, which happens to be in one of the finest parts of the world, Phoenix, Ariz.; Mr. Robert Bennett, senior vice president, broadcasting and production, from Boston; Mr. Douglas

Raymond, executive director, Retail Advertising Conference, Chicago.

Gentlemen, you may be seated. I repeat what I said before. If you have a full text and would just like to comment on it, the text will be made a part of the record. So you will proceed and keep your eyes on the lights as you go along.

We will start with Mr. Raymond.

STATEMENTS OF DOUGLAS A. RAYMOND, EXECUTIVE DIRECTOR, RETAIL ADVERTISING CONFERENCE; RICHARD Q. DeANGELIS, VICE PRESIDENT AND GENERAL MANAGER, KPHO-TV; AND ROBERT M. BENNETT, SENIOR VICE PRESIDENT—BROADCASTING AND PRODUCTION, METROMEDIA, INC.

Mr. RAYMOND. Thank you, Mr. Chairman, members of the committee.

My name is Doug Raymond. I am the executive director of the Retail Advertising Conference. Founded 32 years ago, the RAC, a not-for-profit organization, is the only international association devoted exclusively to retail advertising and marketing executives. Our membership includes marketing and advertising practitioners from department stores, mass merchandisers, discount stores, specialty stores, shopping centers, advertising agencies, broadcast and print media, and suppliers.

Through our membership roster, our roster of delegates to our annual convention, and additional executives recorded on file, we reach approximately 10,000 retail marketing and advertising executives worldwide. Members of our board of directors are representative of our general membership and convention delegates, and include organizations such as Saks Fifth Avenue, Bloomingdales, Belk Stores, Target Stores, Marshall Field's, Dayton's, Neiman-Marcus, and Montgomery Ward, among others.

It is in their interest and in the greater interest of the general public that the RAC has strongly supported S. 1707 and H.R. 2250 and continues to support retention of the financial interest and syndication rule. Retention of this vital rule would prohibit the three major networks from commanding the monopoly position over television programing and distribution systems. It would strengthen the position of independent television stations and enhance competition, resulting in more diverse programing, increased number of attractive advertising outlets, and lower advertising rates.

In 1972, 73 independents in 38 markets had but a 9-percent share of the national TV audience. In 1982, 179 independents were in 86 markets, commanding a much healthier 21 percent share. And according to the Association of National Advertisers, an organization representing some of the Nation's largest advertisers, in markets with high levels of independent television operations advertising rates are 20 to 60 percent lower than in markets with lower levels of independent TV activity.

The ANA, by the way, has already addressed this issue before the FCC and the House Telecommunications Subcommittee.

The impact of retention of the rule is enormous. It avoids concentrating power in the hands of the three major networks, which is

extremely healthy if one views this issue in the greater context as supportive of the free enterprise system itself. Economic realities would certainly encourage the major networks to exercise their considerable power should the rule be repealed.

It prevents the almost certain increase in advertising rates which would be caused primarily by program producers increasing prices to the networks to offset the loss of expected syndication income. It is highly unlikely that the networks would reduce advertising rates. Indeed, it is most likely that because of marketplace conditions and reduced competition, advertising rates would increase dramatically.

Retention of the rule would also help prevent smaller advertisers, unable to withstand advertising rate increases, from being virtually forced off the air. Denying access to television advertising to smaller advertisers denies them a major means of selling their products and services. Members of the retail industry in particular, both large stores and small, are among the greatest users of spot TV, and they have the greatest need for maximum opportunities to target their audiences. Healthy and competitive independents mean more outlets, more targeting opportunities, for advertisements.

Repeal of the rule would also result in two basically unpleasant realities: One, consumer prices for products and services would generally increase as a result of increases in advertising rates, which no doubt would be ultimately passed on to the buying public. Many low-margin businesses, such as the vast majority of retailers, might actually be forced out of business as a result of their inability to afford a vitally important advertising medium and the resulting loss of store traffic, sales and profits.

Therefore, retention of the financial interest and syndication rule results in several important benefits to the business community and the general public. It helps support a healthy, competitive, free enterprise system. It provides the competitive environment necessary for the development of more diverse television programing. It helps keep advertising rates at a reasonable level and affordable for the group most in need of television as a selling medium.

It protects the smaller and medium-size businesses, not only retailers but also manufacturing companies and service organizations, from being squeezed by prohibitive increases in advertising expenditures and loss of attractive outlets for their selling messages.

It is this group, the smaller businesses in America, for which we battle the hardest. The impact of repealing the rule would be felt by large corporations as well, but not nearly as severely as by the smaller companies, who indeed represent the very foundation and spirit of this country.

Please help us protect that foundation and that spirit. I urge your support for retention of this vitally important rule.

Thank you.

Senator GOLDWATER. Thank you very much, Mr. Raymond.

Mr. DeAngelis.

Mr. DEANGELIS. Thank you.

Senator Goldwater, members of this committee and staff: I am vice president and general manager of KPHO-TV, a VHF inde-

pendent in Phoenix, Ariz., the Nation's 25th market. I am also a board member of INTV.

KPHO is considered to be one of the leading independents in the Nation. Phoenix is a market which has not been heavily penetrated by cable. Phoenix is a market which clearly demonstrates that network audience erosion is a direct result of independent audience gains, rather than losses to a new technology.

The existing financial interest and syndication rules have created a thriving marketplace in which a large number of suppliers compete to sell KPHO-TV programing. The suppliers profit enormously from my success as an operator. Changing the rules, as proposed by the FCC, will force KPHO-TV to deal with network-influenced or even controlled suppliers of programing.

Unlike the independent producers who profit from our success, the networks would profit greater from KPHO's failure. The reason the networks would profit from our failure is that we compete with their affiliates for audience shares and revenues. Audience ratings and shares taken by the independent stations result in lower ratings and shares in network programs or in local affiliate programs which provide vital network lead-ins.

Like many other independents, I compete with the network stations for audience shares by counterprograming, that is, by giving the viewing public programing choices that are different from the network station's offerings. For example, the network stations tend to schedule news and information programs head to head in major blocks of time during the early evening hours. By stripping recent off-network syndication against these blocks, the independents provide viewers quality programing alternatives.

Today KPHO-TV has been successful enough in its counterprograming efforts to generate an average 22.3 sign-on-sign-off share over the four sweep periods of 1982 as measured by ARB, 22.3. That compares to the three affiliates who averaged 19.3, 21.0, and 22.8 during the same period.

KPHO's 22.3 share in 1982 represents a significant gain from the 14 posted during the average sweep in 1972. In July 1983, our most recent book, KPHO again beat all the affiliates in the market sign-on to signoff for the fourth consecutive year. In the critical 5 to 7 p.m. area during 1982, we averaged a 30 share compared to 13.3, 20.3, and 24.8 for the network stations.

To demonstrate the significance of off-network syndications, let me review our program schedule. From 4 to 11 p.m., our news at 9:30 is the only non-off-network program on our Monday to Friday schedule. The lineup starting at 4 o'clock is: "Laverne and Shirley," "Mork and Mindy," "Eight is Enough," "Happy Days," "MASH," "The Loveboat," "The Jeffersons," "Alice," "Barney Miller," then our news, followed by "Taxi" and "Bob Newhart."

With KPHO's results, if CBS were marketing our most successful program, "MASH," today, do you think KPHO could buy it or renew it at any price? I do not believe so. "MASH," by the way, won its time period last November with a 37 share compared to a 19, a 16, and a 14.

The network has more to gain by withholding or a diverting product from KPHO than can be generated in license fees on the competitive market. By withholding product to diminish the inde-

pendent audiences, the network in its owned and operated and affiliated stations would reap a bonanza in artificially increased advertising rates.

How could they withhold a product? I believe that whatever ownership interest a middleman network acquires will inflate program prices. Higher prices should force many independents to buy fewer or less desirable programs. It is logical that a network owner would be insistent that exceptional programing, such as the next "MASH," be diverted from the independents, probably to its own affiliates and definitely to its owned and operated stations.

While KPHO and other independents are successful, on the whole, the independent television industry is fragile. Many independents are still operating at a loss with the existing rules in place. A change in the rules would probably perpetuate or perhaps even accelerate those losses to the point where stations could be forced out of business.

Many new independents have gone on the air in recent years. These startup operations could be dealt a severe blow by the rules changes proposed today. I believe that the public interest is served best by keeping the rules in place. I believe that the public benefits by a greater choice of news and entertainment programming and ultimately in cheaper goods and services through more competition for advertising dollars.

The networks are a powerful oligopoly. They do provide extraordinary entertainment and information services to our society. However, I feel that the fervor with which they have lobbied for these rule changes is motivated by the prize of being in a position to restrain the primary competition, the independent television stations.

A change in the rules would provide the networks with additional income probably at the expense of the independents. I believe that income to be insignificant in terms of the $6 billion they share in advertising revenues. A greater concern, however, is the long-term potential they would have for creating mischief in the marketplace that is inherent in network ownership of product vital to its competitors. Please take action to prohibit this rule changes from occurring at this time.

Thank you.

[The following information was subsequently received for the record:]

KPHO TELEVISION,
Phoenix, Ariz., November 14,1983

Hon. BOB PACKWOOD,
Russell Senate Office Building,
U.S. Senate, Washington, D.C.

DEAR SENATOR PACKWOOD: During the November 4, 1983 hearing on S. 1707, I made a statement about the changing terms and conditions on theatrical movie packages being marketed by the studios to television stations. I sense that my comments may have been confusing and would like to clarify them.

First, KPHO TV's direct competition for theatrical movies or syndicated product is not the local cable operations, but rather all the other independent and affiliated television stations in the market. Since HBO and other pay cable operators use movies as their dominant program fare the studios are changing marketing terms to accommodate this new significant customer. The studios must raise capital to finance and profit from theatrical releases, so it is only proper business judgement that they alter their historical marketing practices to accommodate a new exhibitor.

I raised this point in the hearings to emphasize that the end result to KPHO TV is higher prices for fewer runs over fewer years. I am not complaining that pay cable is successful enough now to pay attractive prices for theatrical movies. This competition for exhibition rights is fair. Nor am I complaining about the studios practices, they are good business practices and properly motivated.

My main point is that the networks have an enormous potential for profit from the failure of the independents. In contrast, the studios have their greatest profit potential in the success of the independents and the cable interests.

If the economics changed so that the independents or cable were funding the creation of significant amounts of first run series, then the potential for the networks to create mischief in the program marketplace would be diminished. At that point, considering changes in the financial interest and syndication rules might be proper. However, the industry is years away from that scenario. It may never develop. With the current dominance of the networks, I believe any change in the rules would impact on the independents in a negative manner. We could expect higher prices for certain and probably unfair terms and conditions that skew toward the network owned and affiliated stations as well. Therefore, the current rules are critical to an "even playing field" so that independent stations have a fair chance to bid successfully for vital programming.

In conclusion, I believe the rules are essential to the continued health of independent stations providing the public with free advertiser supported viewing alternatives to the networks.

Please support a delay in considering rules changes until such time that it can be concluded that network entry will not be anti-competitive to the industry. I will be happy to provide additional information if requested by you or your staff.

Best regards,

DICK DEANGELIS,
Vice President and General Manager.

Senator GOLDWATER. Thank you very much, Mr. DeAngelis. Now we will hear from Mr. Robert Bennett.

Mr. BENNETT. Mr. Chairman, members of the subcommittee, and staff, my name is Robert M. Bennett. I am a senior vice president and director of Metromedia, Inc., and president of Metromedia Broadcasting. I have been involved in the operation of local television stations, both independent and affiliated, for more than 30 years. I appreciate this opportunity to offer Metromedia's strong support for S. 1707 and for retention of the network syndication and financial interest rules.

These rules have increased television program alternatives and advertising efficiencies. The American public, including the now famous Mrs. Murphy of Humboldt, S. Dak., is better off because of these rules. Metromedia was built on the ruins of the defunct DuMont network. During Wednesday's hearings, it was noted that the FCC's television allocations decisions in 1952 were the reasons why our industry suffers from a three-network bottleneck today.

The late Dr. Allen DuMont repeatedly warned the FCC that unless it allocated at least four VHF stations at each of the Nation's major markets, only three networks would survive. The Commission ignored its pleas. The DuMont network failed, and we and the other independents have been trying to get back into the game ever since.

After being allocated out of the network business, Metromedia became a pioneer in the development of independent television stations. We presently operate six independents and one affiliated station in major markets, and since the promulgation of the syndication and financial interest rules, there has been a dramatic increase in the number of independent stations and the audience shares garnered by those stations.

The growth of independent stations has served the public interest by providing the viewing public with greater program diversity. Independent stations typically follow a counterprograming strategy based upon the broadcast or program types different from the simultaneous network offerings. For example, my independent station here in Washington, such as channel 5, offers viewers the choice of watching a prime time newscast instead of a network entertainment program.

Independent stations also serve the public interest by stimulating greater advertising efficiencies in their local markets. In studies submitted to the FCC, the Association of National Advertisers concluded that there is a direct correlation between the growth of independent stations and a moderation in the cost of television advertising availability.

In its tentative decision, the FCC explicably recognized the public interest benefits derived from fostering the growth of independent stations. However, despite the best intentions, the FCC's tentative decision simply fails to comprehend the precarious position which independent stations occupy in the marketplace.

During Wednesday's hearings, the Hollywood producers and the networks each accused the other of being engaged in a risk-free business. The one business which I can assure you is not risk-free is independent station operation. Just a few years ago, most independent stations were unprofitable, and their programing consisted largely of roller derby and so-called professional wrestling.

The networks and many of their affiliates would like to see us return to those less competitive days. However, because of the syndication and the financial interest rules, independent stations gained access to popular off-network programing. The popularity of these off-network programs has been the major factor in enabling some but not all independent stations to become profitable and to afford the cost of a prime time newscast and other valuable public service programs.

Without the syndication and the financial interest rules, independent stations would not be serving the public interest as they are today. Repeal of the rules would place Metromedia and other independents in the untenable position of having to rely upon their competitors for their principal source of program product. If the networks are permitted to control the distribution of the off-network programing either directly or indirectly, those programs will find their way to the network owned and operated stations or affiliated stations. Independent stations will not continue to enjoy a fair opportunity to bid in a free marketplace for off-network exhibition rights.

Under the FCC's tentative decision, the networks would be permitted up to 100 percent of financial interest in programs which they acquire for network exhibition. The proposed requirement that actual off-network distribution be undertaken by a so-called independent syndicator is totally meaningless. Such syndicators would rapidly become network puppets that would insure that the best programs ended up in the hands of the network owned and operated or affiliated stations. Obviously, the networks would not continue to release product to a syndicator who sold to independ-

ents those programs desired by a network owned and operated or an affiliated station.

For a description of the network delaying tactics and self-dealing abuses which prevailed prior to the rules, I respectfully refer the subcommittee to the testimony of Mr. Jim Victory in the FCC's rulemaking proceeding. Excerpts from Mr. Victory's testimony are appended to my statement.

In the past year, Metromedia has been involved in a number of innovative network national program initiatives. These initiatives include 7½ hours per week of late night variety programing, a newly established Metromedia news bureau in preparation for a national prime time news service, 5 hours per week of news and entertainment done live in the afternoon, and the resurrection of "Fame" and "Too Close for Comfort," two programs which had been canceled by the network.

Other independent station operators have also begun to develop new, nonnetwork syndicated programing. If successfull, these initiatives and others to follow will become an important source of program alternatives for both independent and affiliated stations. However, the networks have an obvious and a substantial interest in thwarting the development of first-run syndicated programing. Such programing enables independent stations to become stronger, and provides affiliates with an opportunity to preempt soft spots in the network's schedule.

If the syndication and financial interest rules are repealed or weakened, the network will be able to prevent the resurrection of canceled series such as "Fame" and "Too Close for Comfort." In addition, by diverting popular off-network series away from independent stations, the networks would diminish our ability to underwrite the enormous cost of new first-run syndicated products. The net results would be fewer program options for the American public.

Finally, the networks argue that they are seriously threatened by the growth of new competitors. Appended to my statement are maps [1] which depict the market's penetration of the networks, Metromedia, Home Box Office, and Cable News Network. A brief glance at these maps will illustrate the overwhelming dominance of the three national networks and the relatively lilliputian coverage of competing forces.

Metromedia is not anti-network, and we are not anti-FCC. All we seek is a fair opportunity to compete in the market. We are convinced that the public interest is served by the program alternatives and advertising efficiencies provided by strong, independent stations, and that the continued success of the independent stations requires the retention of the syndication and financial interest rules.

Thank you, Mr. Chairman.

Senator GOLDWATER. Thank you very much, Mr. Bennett.

Mr. Chairman, do you have a question?

The CHAIRMAN. Mr. Bennett, what difference does it make if the networks have a financial interest in the product if they had no right to syndicate it?

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[1] The maps were not reproducible and are in the committee files.

Mr. BENNETT. I think we would be naive, Senator, to think that if they had a financial interest they would not have an indirect control of the syndicated product.

The CHAIRMAN. Not if they were prohibited by the rules from syndicating it, if they literally had no right to.

Mr. BENNETT. Well, my feeling would be, sir, that if they had even an indirect control, somehow or other that syndicator would take it upon himself to make sure that that program being supplied to him by CBS, if it were CBS, somehow would get to the CBS owned and operated stations or the CBS affiliates before it went anywhere else. If it did not, somehow or other, when that syndicator were picked the second time, I doubt very much that he would be the same one that was chosen the first time.

The CHAIRMAN. You talked about resurrecting "Too Close for Comfort" and "Fame"?

Mr. BENNETT. Yes.

The CHAIRMAN. That the networks initially had and dropped?

Mr. BENNETT. That is right, sir.

The CHAIRMAN. Is this not an example of producers having some place else to go? Apparently they have an independent network to go to to market these shows.

Mr. BENNETT. It is an example of fear. We are concerned and have been about the effect that the rule's changes would have on independent television. We are putting out an enormous amount of money to see another season of "Too Close for Comfort" is produced. We do not know where our product is coming from. We do not know where we are going to be able to compete in the future if these rules should be repealed. We live and survive on 6 to 8:30 at night. That is our prime time. That is all off-network situation comedy. There are other day parts that are important to us, but that programing and that time period is critical to our survival. If we do not have that, and it does not look to us as though we would get it if this were to happen, Metromedia's position was, let us see if we cannot try now, at a tremendous cost, and this is costing us a lot of money to do "Too Close for Comfort," as a for instance, or "The Allen Thicke" show late night.

The CHAIRMAN. I hope you are doing it with the hope of making money, are you not?

Mr. BENNETT. We are not making money, sir.

The CHAIRMAN. I say the hope of making money.

Mr. BENNETT. Hopefully, in everything we do, we hope to make money.

The CHAIRMAN. You would not have gone into it if you thought you were going to lose money.

Mr. BENNETT. We have gone into—We go into a number of kinds of programs, mostly public affairs, that cost us money, which have to be supported by the success of 6 to 8. That is key to our success.

The CHAIRMAN. I understand the public service time. All radio stations, television stations are involved in that. In most cases, most of them lose money on public service unless they are very terribly produced and dully produced, and you sit in the station with the microphone and talk, and the production costs are nil, and maybe they can break even, but I mean your 6 to 8:30 time, you

are not looking to put on "Fame" or "Too Close for Comfort" without the hope of making money.

Mr. BENNETT. Oh, absolutely.

The CHAIRMAN. No other questions, Mr. Chairman.

Senator GOLDWATER. Senator Wilson, do you have any questions?

Senator WILSON. Thank you, Mr. Chairman.

Who was Mr. Victory, Mr. Bennett?

Mr. BENNETT. Mr. Victory is a syndicator at the present time. At the time that he spoke in front of the FCC hearings, he was referring to the time when he was either the head of CBS films or the second man in charge of CBS films.

Senator WILSON. In other words, when the networks enjoyed the right to syndicate, he was their syndicator?

Mr. BENNETT. That is right, Senator.

Senator WILSON. And the appendix to which you referred us contains the following two statements by him made before the Federal Communications Commission on March 14, 1983. He testified at that time that:

> Many times shows were delayed—I like to say delayed—from going into syndication for network reasons. There was a use for it in daytime. There was a use as a summer replacement. And I think this Commission and we all should understand that the rights are vested in the network and not in the syndication division, and it's the network President and the network Head of Entertainment and his staff that decide when and if they have no further use for that property. Transcript at 240.

Mr. Victory also testified that:

> Before the rules it was standard operating procedure for all three networks syndication arms to offer product to the network owner groups well in advance of release date. Transcript at 242.

Does your experience confirm that of Mr. Victory? And he presumably was in a position to know, having been the agent of the networks in syndication. But is that statement by him something that would be in your experience confirmed by others?

Mr. BENNETT. I would say that that is true. At the time when Mr. Victory was with CBS, I was in Los Angeles, and I think here in Washington during that period, and during the Los Angeles time I am quite certain that programing that was being offered that was controlled by the networks was offered first to their O&O operations in Los Angeles and other markets I know at least in Los Angeles that was true.

Senator WILSON. So, to put it simply, when the networks did have the right to syndicate, they favored network affiliates?

Mr. BENNETT. Yes; I am not saying network affiliates. I do not know that at that time. But they certainly favored their owned and operated stations. They got the first call on anything that had been produced by the network, and that they owned.

Senator WILSON. Is there any reason to suppose that there would be any change in circumstance or motivation at the time under the tentative rule proposed by the FCC now that they would once again after 1990 have the right to syndicate?

Mr. BENNETT. I do not have any reason to believe that it would change.

Senator WILSON. Mr. Raymond, we do not have copies of your statement——

Mr. RAYMOND. It was my understanding that they were delivered yesterday.

Senator WILSON. Oh, all right. I do not have it with me, and we do not have Mr. DeAngelis' statement. I would like to get both of those. Do you have your statement in writing?

Mr. DEANGELIS. I believe you should have my statement. They were delivered Tuesday.

Senator GOLDWATER. They have been delivered.

Senator WILSON. Well, I do not have them, but that is fine.

I would just like to say to those who are representing the advertisers, and both Mr. DeAngelis and Mr. Raymond made references. The statements that you have made, the citation of the statistics in terms of the growth of the independent stations and the number of independent producers, the statements that you have made about the tremendous cost break enjoyed by advertisers who are served by competition in markets served by both affiliates and independent stations, I have encountered those before.

I have encountered those in the testimony of the National Association of Advertisers. I have no reason to doubt them, but perhaps you can give us some authoritative background on how they were determined, either of you.

Mr. RAYMOND. These are ANA figures, and the testimony that had been provided by them previously to the FCC contains a discussion on how they measured—on how they came up with these figures. I do not have that with me, but it is in the record from previous testimony by the ANA. It was a survey of the membership of approximately 300 of the largest advertisers in the Nation.

Senator WILSON. I am particularly interested in the cost figures, the finding that they made that they enjoyed a 20- to 60-percent cost break as advertisers.

Mr. RAYMOND. Right. As I understand it, they had an outside research firm survey particular markets, those that had heavy independent TV activity and those that did not, and comparing the rate on the various stations, they came up with that figure, 20 to 60 percent difference.

Senator WILSON. Mr. Bennett, if the networks had a financial interest in "Fame," would it now be available to Metromedia to add new segments so it could get to syndication?

Mr. BENNETT. I would doubt very much, Senator, if the networks controlled—had an ownership position or financial interest in "Fame," that we would have it. I think, as a matter of fact, what we are trying to do with "Fame" and "Too Close for Comfort" and other shows that we are negotiating with now for potential continuation of their production would happen. I mean, there would not be any advantage in the network allowing that to happen.

As a matter of fact, when shows like "Fame" are canceled, in the past, they have just gone on to a graveyard and been buried.

Senator WILSON. Put on the shelf?

Mr. BENNETT. Well, just discontinued. I cannot think of an exception where anything has been brought back, and here is a case of a show that is given life again, is back in first run, and is competing quite favorably all over the country. The ratings of the show—it is a major success. That will hurt the networks, so why would they want to continue on with something like that that could play oppo-

site the network or on their own stations in markets that could hurt them? So if they had any control over it, they would say, no, let us just let it pass. Let us go on to something else.

Mr. RAYMOND. Senator Wilson, I might fill you in on the ANA studies. I will read from a statement that they have prepared. I found it in my briefcase:

> The ANA's statement on variations in cost per thousand data is based on a detailed analysis of confidential information provided by a number of companies representing scores of different products and thousands of individual spot commercials during the period analyzed.
>
> The analysis covered the second quarter of 1982, and the top 50 markets, and was based on post-buy evaluations. Cost per thousand data relate to each company's demographic target. It included women 18 to 49, women 25 to 54, and total households. In each case, the data reported by a company were consistent in all 50 markets.
>
> For example, women 18 to 49 were used as a target demographic. It was used consistently by that company in each of the markets analyzed. The cost per thousand information by markets was then related to the independent station's share of total viewing,

and then they conclude with,

> Clearly, it is the competitive strength of independents in a market which is the relevant variable, not the number of stations, as others have suggested,

if that helps.

Senator WILSON. The factor that makes the difference is the presence of the independent stations?

Mr. RAYMOND. That is what this study has concluded.

Senator WILSON. And it would be your testimony, Mr. Bennett, that without the presence or without the existence of these rules, there would not have been the growth in the number of independent television stations because they simply could not be competitive.

Mr. BENNETT. That is right. They are finding it difficult even under the present rules to compete when 50 percent of the independent UHF's in the United States are still losing money. So I do not know what would happen to them if their program flow or their ability to bid in a free and open marketplace was not out from under them. I do not know what would happen to them.

Senator WILSON. So what you are saying, in effect, is that without the rules, we would not have seen the growth in the independents, and without the growth in the independents, there would not have been this competition that benefited the advertisers by reducing the costs as advertisers, which means they can offer their products to the public for less.

Mr. BENNETT. Precisely.

Senator WILSON. Thank you, Mr. Chairman. I have no further questions.

Senator GOLDWATER. Thank you. I just have a few questions.

Mr. Bennett, how united are the independent television stations in their effort to retain the FCC rules and support the bill?

Mr. BENNETT. I would think that they would be totally united, sir.

Senator GOLDWATER. How much have independent stations grown since the rules were adopted, and how much of that growth is attributable to the rules rather than other factors?

Mr. BENNETT. From 1970 to 1983, the independent stations have grown from 90 to 179, and I do not think you would have had—what was the second question, sir? I am sorry.

Senator GOLDWATER. Well, how much of the growth is attributable to the rules rather than other factors?

Mr. BENNETT. I think it is totally attributable to the rules.

Senator GOLDWATER. Thank you.

Mr. DeAngelis, this may be parochial, because I know that you had the first television station in our part of the world, and I have watched you grow with great interest. How has the financial interest and syndication rule helped your independent station in Phoenix?

Mr. DEANGELIS. Senator Goldwater, the present rules help us by providing a marketplace for us to acquire programing and providing a diverse marketplace dealing with a large number of suppliers. Programing is the key to any station operation, any network operation. Programing is what our viewers are interested in, and the rules at the present time encourage a large number of suppliers.

Senator GOLDWATER. How would the FCC's tentative decision affect your ability to buy programs?

Mr. DEANGELIS. The ability to buy, sir?

Senator GOLDWATER. To buy programs.

Mr. DEANGELIS. The decision would impact on us tremendously, because it would take the large number of suppliers and shrink them significantly. I believe that ultimately the majority of programs that are of interest to my station and to most independents would be in the hands of three suppliers. Those three suppliers would be beholden to their network bosses. I think that in the shrinking supply arena that our costs would accelerate tremendously.

I have examples of that today. The new media, the new technology, cable, has placed a demand on movies, a demand for movie titles. Traditionally, a few years ago, when KPHO bought a movie package, we were able to negotiate for five runs over 5 years or six runs over 6 years. Today, in just the change of supply and demand, as far as movie titles are concerned, I am finding I am paying more for my movie packages, and I am only able to get three runs over 3 years, or buy packages with convoluted windows going back to cable.

So, the product coming into the pipeline, the number of suppliers we deal with, as it shrinks, it affects my costs and it affects my opportunities to use the materials, and I dread having to negotiate with my competitor for programing.

Mr. BENNETT. Mr. Chairman, could I add to that for one second?

Senator GOLDWATER. Sure.

Mr. BENNETT. It used to be, until the last 3 or 4 years, that every year there would be five, six, seven shows coming off the network having gone through the mine field of 4 or 5 years of prime time, and we would wind up all of us bidding for that product, and you think maybe you could afford to buy one or two, but there was never any question if you wanted to stand up to that that you could get at least one.

In the next 3 years, in the area of situation comedy, in the years 1985, 1986, and 1987, if they should survive, and we are talking about programs like "Cheers" which are known successes but are only getting 23, 24 shares, which hardly constitutes the successes that we used to deal with, but if they get through those 4 or 5 years, there is only going to be one program, situation comedy available for all of us to bid on in 1985 and 1986 and in 1987.

I shudder to think if we only have one program to bid for and we are dealing with our three competitors, what the chances of our getting that are. So the only thing that could happen to us is that our program would get, if we could not buy, would get older and older and older.

Senator GOLDWATER. One general question, and I will be through. Naturally, you are always taking surveys. What do you find about your independent local news presentation, and by local I do not mean just what is happening in your home town, but the independent stations' presentation of news, do you find an audience that is comparable with the network news?

Mr. DEANGELIS. I will attempt to answer that in the case of Phoenix, sir. Our experience in the July book was that our news at 9:30 against network entertainment programing average a 9 rating Monday through Friday. The 3 affiliates at 10 o'clock, one had a 7 rating on the average, one had a 10 and one had an 11. So we have a very competitive news operation.

Senator GOLDWATER. Thank you. I ask that because we have run out of Walter Cronkites, and I sometimes think that the networks do not realize it.

Thank you very much, gentlemen.

The CHAIRMAN. Could I ask Mr. DeAngelis a question? What was it you said right at the end in response to a question about your movies? You used to be able to get five or a run of one a year for 5 or 6 years? Go over that again, will you?

Mr. DEANGELIS. Certainly, Senator Packwood. The traditional movie packages that came down to us as recently as 2 years ago, the stations were able to license those movies for runs, for 5 runs over 5 years or 6 runs over 6 years. Those were negotiable terms. Those were the parameters.

In recent years, fewer packages have been available. The cost of the packages has gone up, and because of the new technology, we are only able to license 3 runs over 3 years.

The CHAIRMAN. What do you mean, the new technology?

Mr. DEANGELIS. I am talking about the needs of cable, of HBO. There is another market. So the new technology is impacting on the marketplace. I make the point not to demonstrate that new technology is a threat to the networks. I make the point that the altering and supply of product changes our costs and it changes the availability and the usage of it, so instead of 5 years license period and five runs of each titles that I have licensed recently, I am dealing primarily with 3 runs over 3 years, or all kinds of strange combinations, and I am sure I have not seen the end of the combinations that will be available.

The CHAIRMAN. From whom do you buy those movies?

Mr. DEANGELIS. We buy them from the syndicators, the producers. We deal with Paramount, with Warner Brothers, with all the

major companies, and in many cases we deal with independent producers.

The CHAIRMAN. And your serious local competition in the last few years is coming from what, local cable operators that buy them from Paramount or Warner Brothers?

Mr. DEANGELIS. Not local cable operators as much as the demands by Showtime, by HBO. The industry is serving their programing needs.

The CHAIRMAN. I understand that, and they are selling them to cable apparently.

Mr. DEANGELIS. That is correct. So the titles are not available for licensing to the local stations.

The CHAIRMAN. I understand that. And the producers who are interested in maximizing their profits are not too concerned if the independent television stations get them if cable is willing to pay them more. Is that correct?

Mr. DEANGELIS. That is absolutely correct.

The CHAIRMAN. You mean these altruistic producers are really not concerned about whether you exist on movies or not, and they will sell them to the highest bidder, and if that happens to be pay cable or HBO, they do that?

Mr. DEANGELIS. Certainly, Senator Packwood. Please, I hope I do not leave the impression that the producers are altruistic. If it were a simple matter, I really would not care who gets the money here, but what the key to the issue is is that the producers are in business and must profit by it, and if the networks were permitted to extract any money from the marketplace as it exists right now, it is going to come from my pocket.

The CHAIRMAN. What I am intrigued with is this. The producers have been crying crocodile tears about the problems of the independent stations as they have been testifying, and they appear to be very concerned about your welfare.

Mr. DEANGELIS. That is correct.

The CHAIRMAN. But not sufficiently that they would give you the movies or to sell them to you instead of to HBO or cable if the latter will pay a higher price?

Mr. DEANGELIS. That is correct.

The CHAIRMAN. Thank you.

Mr. RAYMOND. Could I add one final comment, Mr. Chairman? The ANA was not able to be here in person—the Association of National Advertisers—but they sent a written statement authored by Samuel Therm, their senior vice president, and I like the way Sam sort of summarizes this whole issue, and I will read just in part.

The rules as they are are keeping the independents healthy, giving the viewers more options, while creating a more competitive marketplace. Furthermore, the networks are not losing significant share of audience to the cable systems and do not need any more revenue to compete." And this is the part I like: "In short, the rules are working," and Sam says, "If it ain't broke, why fix it?"

The CHAIRMAN. Whose statement is that?

Mr. RAYMOND. This is Samuel Therm, the senior vice president of the Association of National Advertisers. He has provided a written statement for today's hearing.

The CHAIRMAN. You just made a statement in there that they are interested in the independent, the health of the independent networks, but they are talking about the advertisers, I take it, not the movie producers.

Mr. RAYMOND. That is correct.

The CHAIRMAN. You agree the movie producers are interested in making the most profit they can, regardless of who they sell the movies to?

Mr. RAYMOND. I agree. Yes.

The CHAIRMAN. Thank you.

Senator GOLDWATER. Thank you very much, gentlemen.

Senator WILSON. May I ask just one question?

Mr. DeAngelis, whether you think the movie producers are altruistic or like everybody else, out to make a profit, do you assume, sir—I take it from your testimony that the rules that presently exist encourage not only a growth in the number of independent television stations, but also a growth in the number of independent producers, and that regardless of their motive, the growth in the number benefits you because there is more product for you to choose from?

Mr. DEANGELIS. Senator, I agree. The rules as they exist right now create a free and diverse marketplace, and altering the rules will make it less free. The number of independent producers is important. The variety of producers that we deal with is important. I dread having to deal with three. I dread having to deal with three who are controlled by my competitors, because I can sense what is going to happen, sir.

Mr. RAYMOND. I believe they create a competitive marketplace at every level, and that is simply healthy.

Mr. BENNETT. The future, Senator, I think, if independents are allowed to grow, the beneficiary of our growth will be the viewing public.

The CHAIRMAN. What I am intrigued with, Mr. DeAngelis, is not this, not the diversity and availability of product, but up until a couple of years ago, you were satisfied that you were adequately able to bid and get what you call a reasonable contract for a number of years.

Mr. DEANGELIS. That is correct.

The CHAIRMAN. And even at that stage the producers could have sold the movies to the networks if they wanted to.

Mr. DEANGELIS. They did.

The CHAIRMAN. They do on occasion. At that stage, you were going head-to-head with the three networks, but you were getting a satisfactory deal as far as you were concerned in buying movies.

Mr. DEANGELIS. That is correct. I want to clarify something, Senator Packwood. I was not going head-to-head with three networks. I was going head-to-head with the affiliates in competing for those packages, and yes, I was able to compete because I was able to pay the price that was a higher price and more profitable for the producers.

The CHAIRMAN. That was while the rule was in effect?

Mr. DEANGELIS. That is correct.

The CHAIRMAN. And the rule is still in effect, and your problem has come with the growth of pay cable television. No change in the

rules. No change in the number of producers. A change in the technology, and the fact that pay television is able to bid a very high price.

Mr. DEANGELIS. That is correct, and they are competing for the programing that I also need, and I do not have a problem with that. The point that I make is that we are dealing with a limited supply of programs, so we are dealing with an opportunity to change the rules very easily, and I go back to the statement I made in my testimony.

The economics that we are dealing with here are all out of whack. I have seen estimates that we are talking about an $800 million syndicated industry. The networks are currently splitting up over $6 billion. If they were to take as little as 10 percent of the syndicated industry, we are talking $80 million. That would pose a tremendous burden on the independent stations.

In terms of the impact on the networks' financial health, most businessmen would round that off, gentlemen, in terms of the impact of three sharing $80 million versus $6 billion, but the impact it would have at the end of the pipeline when it came to me to buy programing is, it is going to artifically increase costs because you have a middleman taking them out.

The CHAIRMAN. You are missing the point of what I am driving at. Assuming no change in the rules at all, the argument has been made by many people that cable television, pay television is a minor portion of the market. It is irrelevant. As far as you are concerned, it is a damned tough viable competitor who on occasion is outbidding you on movies.

Mr. DEANGELIS. In that regard, yes, sir.

The CHAIRMAN. Thank you.

Senator GOLDWATER. Thank you, gentlemen. You may be excused.

Our next panel will be Mr. David Henderson, chairman of the Television Operators Caucus; Mr. Robert Taft, Jr., Taft Broadcasting; William J. Moll, president and chief executive, broadcasting and entertainment, Harte-Hanks Communications, Inc.; Thomas Cookerly, chairman of ABC-TV Affiliates; Mr. William Putnam, chairman, WWLP-TV, Springfield, Mass.; and Mr. David Londener, vice president of the research department, Wertheim & Co., from New York.

Gentlemen, because of the size of this panel, we are going to have to stay a little closer to the time. I hope you will observe the lights and govern yourselves accordingly.

I might say to anybody who is coming up and who is hungry had better get out and get a sandwich, because we are going right through until this thing ends.

I think we will start over here with Mr. Putnam.

STATEMENTS OF WILLIAM PUTNAM, CHAIRMAN, WWLP-TV, SPRINGFIELD, MASS.; DAVID E. HENDERSON, CHAIRMAN, TELEVISION OPERATORS CAUCUS, PROVIDENCE, R.I.; ROBERT TAFT, JR., COUNSEL, TAFT BROADCASTING, WASHINGTON, D.C.; WILLIAM G. MOLL, PRESIDENT AND CHIEF EXECUTIVE OFFICER, BROADCASTING AND ENTERTAINMENT, HARTE-HANKS COMMUNICATIONS, INC., SAN ANTONIO, TEX.; AND THOMAS B. COOKERLY, CHAIRMAN, ABC-TV AFFILIATES BOARD OF GOVERNORS

Mr. PUTNAM. Thank you, Senator.

My name is William Lowell Putnam. I am the chairman of the board of Springfield Television Corp. of Springfield, Mass. We hold the first UHF construction permit granted by the Federal Communications Commission and its first UHF license, and operate the first station constructed after the enactment of the all-channel receiver law.

We are also the licensee of an independent station, UHF, in competition with three network-affiliated VHF stations in Salt Lake City.

As I am sure you are aware, life is not all that easy in UHF television, but we have managed to make a go of it.

I have appeared before various committees of the Senate for 30 years as a spokesman for UHF television, and I have been in it longer and deeper than anyone else in the Nation.

At the very start, I would like to disabuse you of one error I have heard widely implied here today, namely, that somehow the financial interest rule is responsible for the existence of many UHF stations. This is just so much hokum.

The present-day flowering of UHF independents is due to the fact that the all-channel receiver law is beginning to bear its full fruit, and the many UHF channels which were heretofore economically unusable due to receiver incompatibility are not utilized as a valuable asset both to broadcasters and the public.

The financial interest rule has absolutely nothing to do with this condition, as our experience over the years has demonstrated. A number of broadcasters are also syndicators or distributors of programing that they either own outright or serve as agents for the owners, and this is a business which has grown enormously in recent years. Those syndicators who are also broadcasters, or perhaps it is the other way around, include multimedia, Westinghouse, Taft, Viacom, Cox, 20th Century-Fox, and a bunch of others. They are all honorable people, but they are on both sides of this argument, and their syndication arm seems to speak louder, perhaps with more profit, than their broadcasting department.

From outside the television industry there are, of course, all the various Hollywood producers who for obvious business reasons do not relish the idea of having three more entities back to sharing the future of the business. However, among true broadcasters, I have heard very little negative talk about the possibility of the networks going back into the syndication business.

Our own experience is indicative of the reasons why. Some 20 years ago, when the networks were all in the syndication business, we bought programs from each of them from time to time as we

thought our needs justified. Though being at that time exclusively an NBC affiliate, we bought from the other two networks as well as from NBC's syndication arm in addition to a variety of independent syndicators.

In all those instances, we felt the product was priced fairly, but we certainly found that when we had difficulties with scheduling or needed to stretch out the payments, difficulties that were almost routine for UHF operators in those years, the network syndicators were understanding of our problems as small market broadcasters. The major syndicators then in the market were much more hard-nosed, and in a couple of instances downright mean about holding our toes to the fire.

More recently, we have found at our independent station in Salt Lake City that the best program on our air in terms of ratings, revenues, et cetera, is one that was 100 percent owned by NBC. In their business judgment 2 years ago they decided to put "Little House" into syndication, and we bid on it from the distributor World Vision, a subsidiary of Taft Broadcasting, outbidding the CBS affiliate in that market, and it is the best thing on our air.

From these experiences, I deduce that there is nothing in their past performance which would lead anyone to feel that the networks are likely to be hard taskmasters of some sort or engage in coercive behavior with regard to stations should they be allowed to own partial interest in the programs that appear in their lineups.

As a matter of fact, with the burgeoning strength of various other home delivery systems, pay and otherwise, there is a very high element of concern on our part as a free television broadcaster that the networks be allowed to have every incentive possible to air attractive programs, including the right to get something out of their future uses.

As the operator of an independent, the record shows the networks are already willing to let us make use of the best programs they have got. Now, I realize that in adopting this stance, and I am speaking directly counter to the position held by the National Association of Television Program Executives and INTV, station groups to which I am a long-time subscriber, maybe INTV and NATPE collectively know things of which I am unaware, but I have been owning and managing television stations longer than anyone in those organizations—longer, I fear, than anyone testifying in this hearing—and I simply have never seen evidence of the conditions they appear to be so terrified of having to face should the present financial interest rules be amended or dropped.

Finally, let me observe that the vast amount of unremunerative news and public service provided by the networks and free broadcast of this Nation which routinely provides all of you gentlemen with a nationwide outlet for your views is simply not comparable to the totally self-serving pocketbook interest of a few Hollywood producers trying to insulate themselves from competition who have never offered any free service to the American people.

Thank you, sir.

The CHAIRMAN [presiding]. Thank you. Mr. Henderson?

Mr. HENDERSON. Thank you.

Mr. Chairman and members of the subcommittee, I am president of the Television Operators Caucus, an organization recently

formed by local television broadcasters. Its steering committee consists of senior executive officers of Capital City Communications, Cox Communications, Metromedia Television, Post-Newsweek Stations, Storer Communications, Taft Broadcasting Co., Westinghouse Broadcasting, and Cable and Outlet Broadcasting, of which I am president.

The caucus' purpose is to define and present to the industry and to appropriate government authorities positions on issues of particular concern to the continued development of quality local television service for the people of the United States. Program syndication by the national television networks is one such issue, and the caucus appreciates the opportunity to discuss that issue with you today.

Some members of the caucus have differing views on various features of the FCC's tentative decision in Docket 82-345, in particular whether the networks should be allowed to acquire a financial interest in programing, and several have expressed their position on this issue separately before the FCC.

The caucus does, however, have a firm common ground which may be stated briefly. The FCC's tentative decision should not be allowed to stand as is. The networks should not be allowed to syndicate program product. There should be no sunset provision on this prohibition. And it must be confirmed once again that nothing in the FCC's ultimate decision directly or indirectly undercuts the continued vitality of the prime time access rule which is critical to a diverse and a competitive marketplace.

The public is not served by a decision which would permit network entry into first run syndication market, and which would permit network syndication of all off-network programing except prime time entertainment series, and the problem would be compounded if the off-network restriction were to expire in 6 years, meaning that it would be operative for only 1 year in the case of popular series running 5 years on the network, and if the network's first-runs and syndication efforts were allowed to invade the prime time access period.

The tentative decision did not focus carefully on these matters. First, its analysis ignored the $275 million first-run syndication market, despite the fact that the independent syndication industry is the only alternative to the networks as a source of rational programing, and despite the fact that the current prohibition encompasses first-run syndication in large part to prevent network dominance from impeding the continued growth of that program source.

Second, even if its analysis of off-network syndication was incomplete because except for warehousing it concerned itself only with the network program supplier relationships rather than the impact of network syndication activities on TV stations and the public, the FCC's rulemaking record makes clear, and you will undoubtedly have heard in greater detail from other witnesses here that networks can adversely impact a competitive marketplace in many other ways than warehousing.

Any number of licensing strategies might be employed to disadvantage independent stations in favor of owned and operated stations or affiliates when syndicating either first-run or off-network programing. Even the warehousing restriction for off-network

series is ineffectual in the context of the proposed 6-year sunset. Networks could still control the timing and direction of product release, and as to the most popular and thus the most valuable series, which might run 5 years, the restriction would be operative for only 1 year, and for series with shorter network runs, nothing would prevent them from offering independent syndication rights only until the 1990 sunset date.

The sunset provision is wrong for the added reason that it is wholly without factual support. Whatever crystal ball the FCC used to prophesy a competitive utopia in 1990, prophesies are not a basis for reasoned decisionmaking. If circumstances in 1990 justify relaxation of the rule, that will be an appropriate time for the FCC to revisit it.

Finally, some may argue that the tentative decision can be construed as diluting the basis for the prime time access rule or indeed undercutting it by permitting networks to syndicate first-run product in the access period. It is clear to us that this is not the case, but further confirmation would be helpful in eliminating all possible doubt.

When the FCC initiated its proceedings, it made a commitment not to involve the prime time acccess rule. Its mass media bureau chief also recently ruled that the tentative decision would not permit the networks to syndicate anything in access time. To eliminate any potential for misunderstanding, this should be nailed down once again.

To the extent that certain dicta in the tentative decision might be considered inconsistent with some of the premises of PTAR, the Commission should confirm that its findings relate only to the network, network program production industry, including the distribution of reruns, and are not applicable to PTAR and the first-run syndication market. The public interest is in the greater diversity of free television outlets and programing requires that the FCC's tentative decision be modified by Congress if necessary to retain the existing syndication rule, to delete the proposed sunset provision, and to further confirm the prime time access rule is alive and well.

Thank you for this opportunity to present our views.

Senator GOLDWATER [presiding]. Thank you. Senator Taft?

Mr. TAFT. Thank you, Mr. Chairman.

At the outset, let me express our appreciation to the Chairman and to the sponsors of this legislation and the original sponsor, for the opportunity to appear here today. I do so on behalf of Taft Broadcasting Co., of which I am a counsel and have been a director over the last 30 years except for the period in which I served in this body and in the House.

We are a typical group owner with three independent stations and four network-affiliated stations, and we support the passage of S. 1707 and oppose repeal of the syndication and financial interest rule. Let me at this point assure Mr. Putnam, who has made comments about other interests, that for our syndication arm, Worldvision, which is a very fine part of our business—and we are concerned about competition, and remaining in the syndication field as well as in the broadcasting field, if indeed the rules are repealed—our revenues from our syndication operation are $20 million i. our

last fiscal year, fiscal 1983, ending in March, as compared to $110 million from our television broadcasting, and there is no question of the tail wagging the dog in this case. So, I am speaking for an owner of affiliates and the independent stations.

I thought I would take the 5 minutes I have today not to rehash the arguments the committee has had before it, but rather to, as some say, police the battlefield and kill off the wounded, and by that I mean kill off the wounded issues. I think there have been a number of arguments that have been made that really deserve killing off, and let me just touch upon them briefly.

The first is that all network affiliates support repeal of the rule. TOC, the television operators caucus, for which Mr. Henderson just testified, has eight group owners. They have 35 affiliated stations, and 13 independent stations. There are also named in support in the files of our position against repeal of the rules 9 other group owners with 22 stations. Also, I think there are a great many other affiliates throughout the country, particularly in the larger markets and the ones who have the strength and the inclination and the ability to preempt network time, who do not support repeal of this rule.

Second, I would like to take up the question or the argument that has been made that the antitrust laws would be adequate to handle this situation. Unfortunately, that just is not the case. Let me quote for a moment from testimony of Mr. Stanley Gorinson of the Justice Department before the Federal Communications Commission, in this proceeding. He said as follows:

> This could have an adverse effect on independent broadcast stations which use off-network programing to compete with the networks and their affiliates in each market. If this effect were achieved through tacit rather than overt collusion, the antitrust laws might as a practical matter not reach the network actions.

That is the case under the antitrust laws as they stand today. Conscious parallelism is a very dubious doctrine under antitrust laws. The standard that is raised generally, and the best legal opinion I have been able to get on it, is whether or not there was a legitimate business reason for the course of action followed by those acting in conscious parallelism, and here, why would there not be?

You've got three networks, and they are so similar. They each have approximately 200 affiliates. Each of them has five owned and operated stations in major markets in the country, and they each have approximately $2 billion in revenue. Why would they not act in this same way? There can be conscious parallelism and total control of this market, without any violation of the antitrust laws. I have been trying to tell Chairman Fowler this since the very beginning of this proceeding. We have filed, and I have submitted for the record, a long memorandum submitted to the Justice Department covering these arguments, should members of the committee wish to go into it further.

Now, the next phony issue that I would like to knock off is one that was mentioned by all three of the network witnesses yesterday. They somehow see here that the the existence of this rule would be a threat or is a threat to free television. This issue was brought up before the Commission because some of the witnesses

appeared to have been brought in there because of fear of this happening. Four of the five Commissioners jumped all over them.

I have a quote in our filed statement from Commissioner Dawson emphasizing this point, but if you think there is anything in it, I just urge you to go to the record, read from the transcript what the four Commissioners said about it as being a totally phony issue. It simply is not true. There is no threat to free television here, and as the Commission said, if there were, they would be the first to be coming in and examining it.

Moreover, if you think there is a threat to free television, what could be a greater threat to free television than wiping out the independent stations? They are the ultimate guarantors, as are also the affiliates who would preempt and are strong enough to preempt. They are the guarantee of free television in the future, not the networks. If anybody is going to go into the pay television business, I suggest that if there is some economic incentive to do so, the networks may well be the first to do it. They have started in other developments in the communications industry, and very properly if they wished to do so.

Now, next, I would like to just take for a minute the question of "warehousing," because there has been an attempt to say the only question here is warehousing of product for the television stations. That is simply not true. Control is the issue, not warehousing. There may be no warehousing, whatsoever, as we have said in our statement. Control of the programs is really what we are talking about, control of to whom they are sold, control of the hours they run, control of the number of runs. And there is nothing that will prevent the networks under the antitrust laws or anything else from controlling completely the off-network product if this rule is not kept in effect.

And finally, on Wednesday, Senator Packwood said that the major producers and their affiliated companies have bargaining power equal to that of the networks. This may be true. As Mr. Blumenthal pointed out, however, it is largely irrelevant. Small producers, independent stations, and affiliates who would preempt and are seeking to obtain product, are the ones with whom I am concerned because that is the public concern.

Indeed, I think one of the major concerns of small producers is that repeal of the rule, if it did not lead to holding of syndication rights by the networks themselves, would lead to deals between the networks and the major producers that might result in the major producers becoming the principal syndicators, dominating the syndication market along with the networks. This raises a concern of big business control, completely at odds with the public interest and completely at odds with what may be the interests of the various television stations, both independent and affiliates, involved.

Independent stations and affiliates, independent producers, and the public would suffer from repeal. I think that we should not and we cannot control quality, of course, but the diversity that you are getting as a result of this rule today is what is going to be the best assurance and really the only assurance of quality in this situation.

Thank you.

[The statement follows:]

STATEMENT OF ROBERT TAFT, JR., COUNSEL, TAFT BROADCASTING CO.

I. THE ISSUE AND CONGRESS

Taft Broadcasting Company welcomes the opportunity to file a statement with this Committee and expresses its appreciation to the Chairman and Senator Wilson, the principal sponsor of S. 1707, for introduction of the measure and for setting hearings. We feel that it is essential that Congress concern itself with the issues involved at this time to avoid serious damage to competition and to protect diversity and localism for the public in television programming. The issue as we see it is a very simple one. Will the broadcasting networks be given power to re-establish their over-riding domination over the supply of television entertainment programming? If such domination were re-established, injury to the public's interests in television broadcasting would be serious, and the adverse competitive impact on television stations such as those owned by Taft Broadcasting, three independent stations and four network affiliated stations alike, could be devastating. The Congress is the body primarily responsible for establishing and supervising national policy questions as fundamental as those raised by FCC Docket BC 82-345. The Federal Communications Commission is fundamentally a creature of Congress, and historically there has been close supervision of policy decisions of the Commission. FCC expertise, however, is limited to communications. A Congressional review and a hold on the likely action of the Commission at this time will prevent a misdirection of policy.

II. DESCRIPTION OF TAFT BROADCASTING CO.

Taft is appearing on this panel as a typical group owner of television stations. We are a communications and entertainment company, with operations in television and radio broadcasting, amusement parks and related leisure time activities, production of entertainment programming, and ownership of some cable television. The Company's seven television stations consist of four network affiliates (ABC affiliates in Birmingham, Cincinnati, and Columbus, and an NBC affiliate in Kansas City) and three independent stations in Philadelphia, Washington, D.C., and Miami, Florida. Broadcasting produces the largest part of the Company's revenues and profits.

Because of the Company's activities in: (1) network-affiliated television stations, (2) independent television stations, (3) production of television and cable programming, (4) distribution of television and cable programming, and (5) operation of cable television systems, the Company is well-placed to evaluate the impact of repeal and the necessity of retaining the Syndication and Financial Interest Rule. The Company believes that retention of this Rule continues to be necessary to permit competition in television programming to exist and develop program sources and outlets for independent television stations and affiliated stations which wish to air non-network replacements.

As an owner of seven network-affiliated and independent television stations, the Company has benefited from the option, created by the Rule, to purchase programming from a variety of sources. While this benefit is more obvious with respect to independent stations which must program their entire broadcast day, it also exists with respect to our network affiliates, since they seek to avoid network domination and control and to develop alternative attractive programming preempting less desirable network shows.

The impression has been given to the Commission and perhaps to this Committee that all network-affiliated stations support repeal of the Rule. This is far from the case as to affiliates with group owners and a number of other affiliates in the larger markets. More and more there has been a tendency in those stations to examine the quality and marketability of certain network programming. Where the station's standards are not met, it has been possible for stronger affiliates to find other product more attractive to their audiences and to preempt network programming. While these preemptions are still occasional, these developments are in the public interest and promote competition, diversity, and localism.

As a producer and as a distributor, the Company has found a variety of potential outlet sources to be invaluable in negotiating production and distribution contracts which accurately reflect the actual risks among the parties.

The Syndication and Financial Interest Rule has made it possible for entities such as Taft to even think of competing with the networks, despite their dominant economic position and gateway control. To date, however, such competing entities have not become strong enough to withstand, singly or as a group, the concerted economic forces which the networks consciously or through their oligopsony routinely brought to bear upon the program producers and outlets prior to adoption of the Rule. Indeed, even with the Rule in force, these economic forces have restricted po-

tential development of Taft's program production, program distribution, and station programming.

III. PHILOSOPHY AND TIMING OF AMENDMENT OF REPEAL OF THE SYNDICATION AND FINANCIAL INTEREST RULE

Deregulation, or "unregulation," is the announced goal of the Federal Communications Commission today in many proceedings. The Company agrees with this goal when its pursuit is likely to lead to the underlying objective: promoting an industry which, because of free and fair competition, is responsive to the public. The Company does not believe that repeal or amendment of the Syndication and Financial Interest Rule under present or foreseeable conditions would promote such responsiveness. Therefore we oppose repeal or amendment and ask for support for S. 1707. In the rulemaking proceedings before the FCC, the Company has filed comments, reply comments, and comments on the Tentative Decision. Attached as Appendix I to our comments was an independently prepared economic report by Walter G. Bolter, Ph.D. (the Bolter Report). Copies of that Report are being provided to this Committee, and we request that the Report be made a part of the Record without reprinting.

Although, as pointed out in the Commission's Notice of Proposed Rulemaking (47 Fed. Reg. 32959, July 30, 1982), the Rule was adopted in 1970, we disagree with the Commission's conclusion that market changes which have occurred since adoption of the Syndication and Financial Interest Rule would warrant repeal of that Rule today. As recently as 1980, the Department of Justice, in its antitrust actions against ABC, CBS, and NBC found that the networks were using their dominance and control over access to national exposure for entertainment programming to control program availability so as to force program suppliers to relinquish valuable rights and interests in their programs and to restrain and monopolize trade and commerce in television entertainment programming. (See Competitive Impact Statement, *United States* v. *ABC, Inc.*, 45 Fed. Reg. 58445, September 3, 1980.) Thus, as recently as 1980 the Department of Justice reaffirmed its agreement with the Commission's very analysis and conclusions regarding market conditions which led to the adoption of the Rule. Under those noncompetitive market conditions, the networks can be expected to use their economic and market dominance to control program availability so as to maximize their own financial return determined by advertising sales, rather than to respond to public interest in competition, diversity, and localism in programming, goals that can frequently be incompatible with network profits.

For example, recent figures show the three networks provide 69 percent of all video programs and, if one includes affiliates, have an 82 percent share of all viewing. (See Bolter Report.) Although new technologies are beginning to enter the industry, the networks continue to dominate by any measure. Repealing the Syndication and Financial Interest Rule today, while the networks maintain their dominance, would return to the networks total and absolute control over the entire television programming industry. As pointed out in the staff report, the Second Interim Report of the Office of Network Study:

"The dominant position which the networks have achieved in their effective control of the program market has serious consequences for the public interest in the wider and more effective use of television channels and the ability of licensees to serve the public interest in community broadcast service. The public interest in a nationwide competitive television industry requires as broad a base as is feasible from which programs necessary to enable licensees to serve the public interest in television service may be selected. In a healthy, competitive television industry, that base should comprise as many diverse and antagonistic sources as possible, so that spiritual, cultural, and economic aspirations generated in our society may have the opportunity, in competition with each other, to reach the public and to vie for acceptance in a free market for ideas."

Even under the current Rule, the networks continue to decide which programs enter the video pipeline. This is because the networks, due to their economic dominance and the entry barriers for new networks, remain the major buyers of first-run programs. However, due to the Rule, the networks no longer can lock up a show produced by others once it has run on the network, nor can they favor those in which they have a financial interest. The result has been enhanced competition in the secondary market of syndicated programming, a market of off-network product upon which independent stations depend and to which affiliates wishing to preempt also can turn. At the same time, program supply has increased due to producers being willing to risk larger investments in new shows, since the financial rewards

for later off-network showing are no longer being diluted by forced surrender of part of the profits to the networks. Also, since the Rule's adoption, there has been a 51 percent increase in syndication program suppliers (see Bolter Report, Chart 69) and a nascent first-run syndication market has developed in which specials and series such as P.M. Magazine, Entertainment Tonight, and A Woman Called Golda are produced and sold directly to non-network station groups made up of independents as well as affiliates.

For all these reasons, repeal of the Rule is not appropriate at this time. The extent of the benefits of the Rule is just beginning to be seen. The new technologies have just begun to make themselves a factor in the industry. So long as the networks maintain actual dominance economically and in terms of program outlets, repeal of the Rule is premature and not in the public interest. Such premature repeal would diminish competition in the television industry, cripple the emerging first-run syndication sector, eliminate many independent syndicators, seriously weaken independent stations, and stifle innovation and diversity in television programming.

IV. STANDARD ANTITRUST REMEDIES ARE NOT ADEQUATE TO PROTECT THE PUBLIC IF THE RULE IS REPEALED OR REVISED

At the outset, Taft would like to use this opportunity to rebut the proposition that standard antitrust remedies are adequate to protect the public if the Rule is repealed or revised. The Company's position on this point has been argued at length in my letter of June 9, 1982, to the Chairman of the FCC and in comments filed by Taft with the Department of Justice, dated January 4, 1983, copies of which are attached. Therefore, I will not repeat the technical and economic arguments. The issue is not one that the Congress or the Commission should discard as primarily for lawyers. Whether or not remedies which adequately protect the public interest are available to the Department of Justice or Federal Trade Commission in this case is not the question. Rather, the question is, which agency has the primary responsibility to see that the public interests in program diversity, localism, and competition in broadcasting are protected? And the answer is clear: that responsibility lies first and foremost with the FCC. Justice has said as much in its filed comments. However, the Commission has thus far passed the buck. Congress delegated to the Commission the responsibility for applying standards in the public interest such as diversity, localism, and other communication related public interest issues. We believe that consistent with this assignment the Commission should recognize the market for television product should be an open and competitive marketplace, not network controlled. The concept that "unregulation" through repeal of this Rule will result in a free market is specious, as shown by the past record and the strong economic incentives for the networks that are bound to come into play without the Rule.

Traditional antitrust procedures are inadequate to protect these public interest standards just discussed because there is no monopolization by any one firm. Rather, there exists a gateway control for product through and oligopsony of three networks, without need for conspiracy, follow consciously parallel courses with the same effect as a monopsony but quite possibly without any violation of existing antitrust laws.

Repeal would restore the networks to an undersirable oligopsony position in regard to the control of network entertainment product and the distribution of off-network product. This would reduce competition in the production of such material and inevitably lead to anticompetitive restrictions by the networks on programming of both independent television stations and network affiliates. As we have repeatedly pointed out, and as the Justice Department has concurred, the antitrust laws and enforcement procedures frequently offer no adequate relief from these threatened ills. In his oral presentation to the Commission, Mr. Stanley Gorinson, Chief of the Special Regulated Industry Section, stated as follows:

"The networks would have an incentive and may have the ability to withhold some of this programming from syndication in order to increase license fees or advertising rates. This could have an adverse effect on independent broadcast stations which use off-network programming to compete with the networks and their affiliates in each market. If this effect were achieved through tacit rather than overt collusion, the antitrust laws might, as a practical matter, not reach the networks' actions."

Moreover, the Consent Decrees entered into by each of the networks were proposed and agreed to based on charges set out in the respective Impact Statement filed by the Department of Justice. Copies of those orders and decrees are being filed with this statement for the Committee's convenience. A reading of those

impact statements, speaking as recently as 1980, contradicts protestations, by the networks as to past conduct and factors bound to affect future unregulated networks activities should the Rule be repealed. Thus, repeal or modification followed by rescission of the consent decrees, which the testimony of Department of Justice representatives to the Commission supports, would make it unlikely that the Department of Justice soon would exercise again its prosecutorial discretion and priorities to provide relief. It is futile to suggest that under such a circumstance private antitrust suits dragged out over years by massive corporate legal resources would amount to any deterrent against antitrust violation, if indeed one should occur. Any such litigation, however meritorius, would be likely to result in settlements or in individual judgments of little use to other persons damaged or to public. In the meantime, irreparable harm would occur to small or marginal companies forced out of business.

V. THE ISSUE IS CONTROL OF SUPPLY—NOT WAREHOUSING

Some of the network representatives have attempted to suggest that the only important argument raised against repeal is the threat of "warehousing" the entertainment product in question. The statement has been made that networks would not warehouse, even if permitted to do so, as it would be (and pre-Rule was) against their economic interest, but that the Commission might include in its order a statement condemning the practice. We believe that the term "warehousing" is a mischaracterization of the problem. It really boils down to the likely result from giving the networks virtually total control over the distribution of off-network product. In oral argument before the Commission, Lucy Salhany, a Taft executive, appearing on behalf of the National Association of Television Programming Executives, made it clear that, to an important degree, the networks still control the time of day programming is aired, both as to independents and affiliates, and that even this limited control is used by the networks and interferes with a competitive marketplace. A portion of her testimony was as follows:

"Then there's the case of 'Family Feud.' The network runs their show in the morning, but there's a syndicated show of a version which some stations run in access, and according to the contracts, contracts we have, stations can't run the show before 5:30 p.m. Well, why this restriction? Because the network demanded the producer give them daytime protection, and to make matters worse, the syndicated shows are different from the network shows. They're damn afraid of competition. If they're not afraid, why is the syndicated half-hour 'Johnny Carson Show' being offered right now, being offered with the condition it can't run late night? It can't run at 11:30. I can understand that, maybe. It can't run at 11:30 against Johnny Carson, but, even worse, it can't run at 11:00 o'clock on independents."

A complete copy of Ms. Salhany's testimony is attached.[1]

Some have suggested that the Syndication Rule be preserved intact, but that the Financial Interest Rule be modified to permit the networks to hold an interest of a noncontrolling nature, such as the participation of a limited partner. While we agree that it is absolutely essential to retain the Syndication Rule intact, we see difficulties with permitting any financial interests to the networks. A full scale review of industry practices and the likely impact of this proposal might possibly resolve some of the unanswered questions if a thorough and comprehensive study were made, but it would be necessary to draft what will be complicated and interrelating protections to make limitations on control effective. As noted in the Notice of Proposed Rulemaking in this Docket, the Commission and its staff at the time of the adoption of the Syndication and Financial Interest Rule found that the financial interest portion of the Rule was vital to prevent loopholes in the syndication protection desired. (23 F.C.C. 2d, 382, 398.)

Any attempt to administer a system for policing the exercise of control over off-network product by the networks will be a most complex and litigious proceeding, with high transaction costs involved not only for the parties, but also for the Commission. One of the basic virtues of the Rule has been that it has been clear in its intent and application so that, absenting a few instances such as the *Viacom International, Inc.* v. *F.C.C.* case (No. 81-4119), the Commission has rarely been called upon to rule on disputes under it. The Commission should recognize that this contrasts favorably with experience with the Prime Time Access Rule, but that any modification of the Financial Interest Rule to attempt to define such ephemeral terms as "control" or "warehousing" would be likely to create areas of dispute far broader even than those under PTAR.

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[1] See House Energy and Commerce hearing dated August 1, 1983 for the statement.

VI. VIABILITY OF FREE TELEVISION IS NOT THE ISSUE

During the hearings before this Committee on November 2, and earlier before the Commission, certain network and interest group witnesses expressed concern that the Rule constitutes a threat to the future of free television. This is astounding because four out of five Commissions discussed the issue and emphasized that no such threat exists under the present Rule and that the spurious threat should not be an issue in the rulemaking. That feeling was epitomized by Commissioner Dawson's statement on page 369 as follows:

"My suggestion was that I don't want anyone on this panel to think that if there were any suggestion that pay television is the wave of the future and you would not have access to free television, that this Commission would's be taking serious action and recognizing that problem, and I just don't want us to confuse the issues in this docket."

The Commissioners made it very clear that if indeed any such threat should come to exist, a hearing on the issue would immediately be called by the Commission. Indeed, based on the investments of the networks in various new developments in the telecommunications field, if there should be any major shift from free television to pay television and pay cable, with or without the Rule, it is hard to imagine that the networks would not be participating actively when there were important business reasons for doing so.

Moreover, if there is concern for the continued viability of free television, one of the best assurances of it is the continued will-being and growth of independent television stations. They have prospered under the Rule, and would be threatened by its repeal.

This phony issue should be dismissed out of hand by the Congress.

VII. THE TENTATIVE DECISION OF THE FCC OFFERS NO PROTECTION TO A COMPETITIVE MARKETPLACE FOR TELEVISION PROGRAMMING

A. *The decision would not prevent network control.*—There is a basic error in the assumption of the Tentative Decision in that it concerns itself only with the possibility of "warehousing" by the networks. With no rule there could be a situation in which there would be no warehousing by the networks, but nevertheless total network control over the syndicated television product market would exist through the networks' gateway monoply on such product for national exposure vital to success of product when shown other than on the networks. Except in the field of off-network prime time entertainment series, the Tentative Decision would not proscribe any controls. Even without provable collusion, direct or indirect controls could lead to restrictions in the market for off-network and other products for independent and affiliated stations which might wish to preempt network programs. This would seem certain to be to the detriment of the public interest in competition, diversity, and localism.

Furthermore, as to prime time off-network entertainment series, the impact of such restrictive behavior could be suplemented through designation by the networks of a very limited number of syndicators for the nationwide syndication rights for large numbers of off-network or other network owned programs, thereby creating a concentrated industry capable of extracting supracompetitive prices and other concessions. The ownership by each of the networks of five owned and operated stations in the top nine markets would provide strong economic incentives for them to impose such restrictions to the detriment of the independent stations. The oft-exhibited desire of the networks for control of the programming of their affiliates also would provide motivation to reduce or prevent preemption by limiting the availability of off-network or other entertainment product. Since the same motivations exist for each of the networks, even without collusion, parallel courses of conduct enhancing the anti-competitive effect seem probable.

In its comments, the Commission states that retention of some restrictions on the networks' power to syndicate is appropriate to protect independent stations and the public from potential warehousing of off-network prime time product. The Commission recognizes that the networks have an interest in a competitive advantage over independent stations in order to favor and protect network affiliates and network owned and operated stations. Indeed, there could be no credible reason for the networks not to use the power of the new rule to prevail over independent stations. The proposed syndication rule purports to avoid any damage to independent stations through warehousing ("the viability of the independents is" according to the comments at Paragraph 201 "the only vestigial justification for retaining the rules") by requiring the networks, within 180 days after completion of the network run, and in no event later than the end of the fifth year of the network run, to transfer all syn-

dication rights for that prime time entertainment series to an unaffiliated syndicator. Yet a network displeased with license contract terms or syndication choices of a particular syndicator could refuse that syndicator further product or even terminate the syndicator so long as the product were transferred to another syndicator with new terms negotiated. Despite subsection (j)(iii) of the proposed rule, such a right would surely be implied.

If, under the proposed rule, the networks decide not to distribute programs themselves, a likely effect would be to make the major producers their distributors. In that case networks and studios would be likely to incorporate other transactions with sale of distribution rights. For example, network X in renewing a show from a studio might offer distribution rights for another hit show to the studio's distribution arm as inducement to extract more favorable renewal terms. This could exclude smaller syndicators who have no production capabilities. Another scenario might allow network X to contract with network Y's syndication arm, which would qualify as a technically unaffiliated party, with understanding that Y would return the compliment, as there would be a common interest in weakening independent stations. At this point the value of distribution rights and popularity of the program may well be less important than the overall deal. This would again deprive independent syndicators from acquiring these products. Diversity, competition, and localism would all be damaged by such practices.

Moreover, even prior to August 4, 1985, the permitted and probable delay in syndication of series whose syndication rights are owned by a network would amount to a limited warehousing of those programs. For example, a network could have a policy of releasing a certain proportion of highly rated programs immediately, but delaying release of others so that the quantity of high quality recent off-network product available in any given season would be artificially depressed, thereby raising the price of the avialable programs.

B. *The sunset provision is defective and unsupported by the record.*—As commented on in the dissent of Commissioner Rivera, the sunset provision is unsupported by the record and is based on speculation on the state of the market in 1990. This difficulty is recognized in the Commission comments. Basing the proposed rule on such speculation for a period which would begin five years before termination of the rule is totally unjustified and would effectively allow a network immediately to demand syndication rights for any period after August 4, 1990. If this is not the intent of Sections (j)(2)(ii) and (7), the sunset provision of the proposed rule, which states that after August 4, 1990, the syndication limitation "shall thereafter be of no force and effect," is defectively worded.

As proposed, the sunset provision would allow syndication rights for programming in any period after August 4, 1990, to be acquired and held by the networks as soon as the proposed rule is effective, thus permitting immediate network control of all off-network syndication available after August 4, 1985. Thus, the Tentative Decision is patently incorrect because by 1990 a major portion of syndication rights could already be network owned. This result could occur because under current industry practices, program directors and buyers for independent and affiliated stations will start to buy product to run in 1990 after the program product has been on network for three years or less. Thus, for a new prime time network entertainment series which starts running in 1985 or 1986, negotiation for station purchase of licenses for off-network programming will commence no later than 1988 or 1989.

Thus, the Tentative Decision offers no relief from the immediate anticompetitive impact of outright repeal.

CONCLUSION

Repeal or modification of the Rule by the terms of the Tentative Decision must be expected to have a serious anticompetitive effect on the market for television entertainment product. Contrary to the public interest, this would adversely impact diversity, localism, and quality. Therefore, Congress has a reason and a responsibility to act through the passage of S. 1707.

Senator GOLDWATER. Thank you very much, Senator.

Mr. Moll?

Mr. MOLL. Thank you, Mr. Chairman.

My name is William G. Moll. I am a senior vice president of Harte-Hanks Communications. I am responsible for an area of business in our company that includes four television stations, nine radio stations, including a couple in your market, sir. Our radio

group headquarters is in Phoenix, where Gary Edens is president of KOY, the station I believe you are an alumnus of.

Senator GOLDWATER. First job I ever had in my life.

Mr. MOLL. Senator, if you are in need of work at any time in the future, we would like to have you back.

We also own a company called Radio and Records. It is a trade journal based in Los Angeles, and in addition to publishing the trade journal, we have a small entertainment division with radio and records that principally is in the business of producing multimedia shows for theme parks, but we have in the past also had a minor role in producing for television syndication.

I should also say that I am a member of the board of the CBS Television Affiliates Association, and am therefore able to report to you that the affiliate advisory board of CBS in a very significant majority has gone on record in supporting the repeal of the financial interest rule. That is the point of view that I share. I am here representing the point of view of my company today, however.

I have submitted to you our printed testimony, and with your permission, sir, I will let that record stand. I would like to just make two or three comments about some of the points that are made there.

It is a little bit difficult perhaps to feel much charity toward major corporations which are multibillion-dollar entities in this country, but I do not think what we are dealing with here is an issue of charity. I do not think it is a hardship issue. I do think it is an equity issue. I think that it is inequitable for one partner, one party in a competition to be shackled with regulations and burdens which inhibit its ability to compete fairly in the marketplace, while others competing in that marketplace are not burdened with the same regulations.

I also think, sir, that it is a diversity issue. I heard a great deal this morning about how keeping the financial interest rule would in fact protect the diversity which exists. It seems to me that the contrary would be true, that the more participants there are in the marketplace, the greater opportunity there would be for diversity, and I think also the opportunity for small, independent program suppliers to develop would enhance that diversity as well. Who would that be?

For one, I can tell you that Harte-Hanks is a company, a small one, that would be interested in becoming a small program supplier. It is a difficult market to enter. One, because the risk is great. We have had a very small participation recently simply because the recession has had its own impact on us. However, we did have a specific case in point that I might share with you in which one former vice president of a network came out with one of those network deals that we were interested, along with a number of other folks, in developing with him a small program supply company.

The choice was for him to join one of the major companies simply because they had a clear advantage over his coming into the relationship with an unknown. He got office space, the back room support, the opportunity to produce, direct, to write, and to have his productions produced with the major studio.

It is a kind of closed community there. It is no more open, perhaps, than the networks. My point is that if the networks were

fully able to compete, we would have that many more opportunities for programing to be produced.

I also think that it is a cost issue. The single fastest growing element of the cost of operating our television stations is the cost of programing.

For example, in our four television stations, and they are all network affiliates, this year our program costs went up 20 percent. Next year we expect them to be up 24 percent. Virtually all of that cost is directly related to the cost of buying programing.

You have heard "MASH" discussed a great deal, and I think perhaps "MASH" is a good illustration. We own it in Jacksonville, Fla., 64th market, one of the smaller markets where we program, where we operate. After we had played it seven times on our own air and three or four times on the network, we have now renewed it at 10 times what the original cost was, some $2.2 million in the 64th market.

I am not here to complain about the price we paid. We made a business judgment, and obviously we think we can make money on that. I simply think that it is back to the equity issue. The rules inhibit those who can participate. Networks now have no opportunity to have that participation.

And finally, I do not take any great comfort in watching the migration of some of the stars that have been heretofore seen on the networks moving into pay television systems. I take no great comfort in seeing Kenny Rodgers and Willie Nelson on HBO, if you will. I am not about to tell you that is a public interest issue, although Willie Nelson is from Texas, so that may make it a public interest issue, but the issue is one of equity, and the ability to compete in an open marketplace. I think that is what rescinding the rules would enable to take place, a freer and more open market. I think that is what the networks want. I think that is what network-affiliated stations want, and I submit to you that that is in the best public interest of the country.

Thank you for the opportunity to speak.

[The statement follows:]

STATEMENT OF WILLIAM G. MOLL, SENIOR VICE PRESIDENT AND PRESIDENT/CEO, BROADCASTING & ENTERTAINMENT, HARTE-HANKS COMMUNICATIONS, INC.

My name is William G. Moll, I am Senior Vice President of Harte-Hanks Communications, Inc., and am responsible for the area of business in our company that includes Broadcasting and Entertainment. We own and operate 4 television stations, all network affiliates, 9 radio stations, and Radio & Records, a Los Angeles based trade publication. In addition, Radio & Records has an entertainment division engaged primarily in producing and marketing multimedia shows for theme parks. We have in the past produced music-oriented specials for television syndication. I represent the point of view of my company. I am also on the board of the CBS Television Affiliate Association. In that capacity I can also report to you that a significant majority of the member stations endorsed the repeal of The Network Financial Interest and Syndication Rules of the FCC.

I share that point of view.

Why is it any of my business? For several reasons.

1. It is an issue of equity.

It is not an issue of economic hardship for any of the parties in this consideration.

It is hard to feel much compassion for huge multi-billion dollar corporations.

Those who benefit from the rules are some of the largest public corporations in the nation—many larger than the networks themselves. They are hardly disadvantaged, underprivileged or undercapitalized.

It is an issue of fairness.

How is it appropriate to shackle one competitor in the market-place with government imposed prohibitions, while allowing other competitors to operate unfettered.

The free marketplace should determine the terms and conditions for competitors.

2. It is an issue of economics for local television stations—both network affiliates and independents.

The fastest growing expense element in our television stations is the cost of programming.

Costs will be up some 24 percent next year, on top a 20 percent increase this year in the Harte-Hanks Television Group.

The demand for competitive programming exceeds the supply of it. For example, every competitive syndicated series available on the market in Jacksonville is under contract. It is the 64th ADI, one of the smaller markets where we operate. Prices are high and getting higher.

The cost to renew MASH in Jacksonville escalated to more than ten-times the original cost. In this small market we renewed a series that had been aired at least seven times already in addition to its network exposure at a total contract cost of $2.2 million. That is relevant to this issue because we believe that freeing the networks to share in the financial return of the shows they underwrite will bring costs down. It will help bring more small production companies into the market. It will help enhance competition in syndication. It will help increase distribution in syndication. It will help increase distribution options available to producers. That is in the public interest.

The more suppliers of quality programming we have, and the more choices of programming we have, the more competitive prices for programming will be for local television stations. And the result will be that the public is better served through more diversity and choice.

Would this relationship result in some mysterious, under-the-table affiliate advantage? Some favoritism? It did not in the past. It is not likely to in the future. There is a healthy adversarial relationship that exists between stations and their network partners and in addition, extensive competition between local stations in every market for the best programming simply precludes the possibility of favoritism.

3. Who are those small program suppliers who would enter the market?

Harte-Hanks for one. We have been restrained by the economic pressures of the recession, and have avoided taking the high risks of seriously tring to develop programming over the past couple of years.

Would we welcome the opportunity to joint-venture production with the networks? Yes, indeed.

Would we also enter joint-ventures with the major studios and other suppliers? Yes, indeed. It is however, a recognized fact that well-established producers obtain opportunities from Hollywood that newer, smaller producers cannot obtain. We are not a well-established producer, and would be handicapped. One effect of the rules is to make it more difficult for unknowns like Harte-Hanks to enter.

4. Rescinding the rules would tend to foster the development of other new program suppliers, large and small. The networks and their affiliated stations want and need the best programming we can get. People watch programs, not technologies, or for that matter even "networks."

5. Further, there is no reason why the networks would not want to finance first-run projects that could be syndicated outside the networks, on independents, for example. They might, if they had the financial incentive to do so. The rules prohibit it now.

6. Why would an affiliate be in favor of such a first-run strategy? Because we would have an equal opportunity to compete with the programming for other stations as well. We all need good programming.

7. The rules tend to favor pay television services. Our free over-the-air broadcasting system in the United States is based on uniquely local service, balanced by a national network service.

The economic underpinnings of this consumer-based economy are founded on our national television system.

If we did not have the networks, we would want to invent them as a means of communicating with our diverse American society. We wold need to reach them as an efficient means of communication for their common good. And, we would want to reach them to make them aware of the consumer products and services which fuel the engine of the American economy. Continuation of these restrictive rules will impair and erode the viability of that system.

8. At issue here is competitive equality for all the parties—networks program suppliers, and local stations, whether independent or affiliated, new services such as

HBO or Showtime. All should be able to meet each other—and new, emerging competitors on a fair and even basis.

In summary, as long as the rules continue in place, they have the effect of distorting unevenly and unfairly—the free national and local marketplace. The television viewer will be the ultimate loser and that is definitely not in the public interest.

Thank you for the opportunity to present our views.

Senator GOLDWATER. Thank you very, very much, Mr. Moll.

And now Mr. Cookerly.

Mr. COOKERLY. Thank you, Mr. Chairman.

I am Tom Cookerly. I am chairman of the ABC Television Affiliates Association. I appreciate the opportunity to appear and present the views of the ABC Television Affiliates Association on this important legislation.

The association consists of over 200 local commercial television stations across the Nation. They are affiliated with ABC Television Network. Although I appear on behalf of ABC Television Affiliates, it should be noted that the affiliate associations of all three major television networks, representing over 600 television stations, share the view that the FCC's syndication and financial interest rules should be repealed.

Our association undertook a detailed study of these rules and their effect on the free over the air television service. We met last year with lawyers and representatives of the networks, independent television stations, and program producers and syndicators. We listened to the arguments made by each, and prepared an extensive analysis of those arguments. We distributed a summary of the arguments for and against repeal of the rules to member stations and solicited their comments. A substantial majority of affiliate stations responded, and of those a substantial majority favored repeal of these rules.

The syndication and financial interest issue has, unfortunately, been characterized as a network versus Hollywood studio issue. The truth is that this issue has an enormous impact on local television stations and local viewers those stations are licensed to serve. ABC-TV Affiliates oppose these rules, because they believe the rules will have an adverse effect on the quality of local free over the air television service.

We believe that to the extent the syndication and financial interest rules impair the ability of the networks to maximize profits in network programing, the rules will ultimately discourage networks from producing high risk programing for network broadcast. That in turn will have the unfortunate effect of undermining the quality of over the air television programing, both for network affiliated stations and independent stations whose programing is largely dependent on off-network material. The Federal Trade Commission's Bureau of Consumer Protection in comments filed with the FCC acknowledged that an effect of the rules has been "reduced purchases by the networks of relatively high cost programing and increased purchases of lower cost programing."

Oddly enough, the rules do not prohibit the networks from acquiring financial interest in programs that are not produced for network broadcast. If Congress or the FCC should continue to make it less attractive financially for the networks to direct their resources to the production of programing for free over the air televi-

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sion, the networks will inevitably divert more and more of their resources to the production of programing for less regulated and in turn financially more attractive delivery systems such as pay cable, DBS, MDS, video cassettes, and video discs.

All three of the major television networks are involved in the new technologies, and intend to employ them to distribute programing. CBS network recently disclosed plans to join with HBO and several major studios to produce programing for pay cable. The FCC's current rules permit CBS to share in the downstream profits from programing it produces for pay cable. The FCC's current rules permit CBS to share in the downstream profits from programing it produces for pay cable.

Moreover, CBS and NBC through RCA have applied for and received FCC authority to provide a direct satellite to home broadcast service. The current FCC rules allow the networks to share in the after profits of programing distributed through DBS also.

One FCC Commissioner recently predicted that with an estimated capacity to soon reach 82 percent of American TV homes by using DBS and cable, the three major networks would eventually "drop most of their terrestrial affiliates." [1] That may or may not come to pass. It is clear, however, that the syndication and financial interest rules create an obvious incentive for the networks eventually to bypass local stations in the distribution of programing.

In short, the principal long-term effect of the syndication and financial interest rules will be to encourage the wholesale migration of expensive, innovative, and high quality network programing to pay, cable, or DBS. Now, some independent stations have expressed concern that if the rules are repealed or modified, the networks will warehouse programing or engage in other more subtle anticompetitive practices. The FCC in its tentative decision [2] has proposed measures to protect both independent and affiliate stations alike against such practices. We believe the measures proposed by the FCC will work if given a chance. We also believe that to the extent competition and diversity presently exist in the television programing marketplace, the prime time access rule, not the syndication and financial interest rules, is responsible.

PTAR, not the syndication and financial interest rules, provides the crucial window in prime time for independently produced and syndicated programing. PTAR, not the syndication and financial interest rules, is responsible for much of the current independently produced and syndicated television programing that has achieved national acceptance.

We support the FCC's proposed modification of the syndication and financial interest rules in the belief that so long as PTAR continues in effect, Congress overall public policy objective of assuring competition in the production, distribution, and exhibition of television programing will be achieved. We urge Congress to give the

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[1] Stephen A. Sharp, Remarks Before The Association of Independent Television Stations, 10th Annual Convention, Century Plaza Hotel, Los Angeles, California, January 18, 1983, FCC Mimeo 1833, p. 5.

[2] See, Federal Communication Commission's Tentative Decision And Request For Further Comments, BC Docket No. 82-345.

FCC's proposed modification of the syndication and financial interest rules a reasonable chance to work.

The Commission's proposal accommodates the interests of independent and affiliate stations alike, and in our view will go far toward assuring the continued availability to local television stations of high quality programing.

Thank you very much.

Senator GOLDWATER. Thank you very much, Mr. Cookerly.

Senator Packwood?

The CHAIRMAN. Let me ask each of the witnesses: You heard Mr. DeAngelis testify previously about the competition cable is giving him on bidding for movies. He owns an independent television station. Just let me start over here and go down the line. To the extent you have experience in dealing with it, is local pay cable becoming a serious competitor?

Mr. PUTNAM. It is very hard to get a precise handle on the degree, Senator, to which this is happening. There is no question that there is an erosion of audience base for local television stations around the country, and it is going somewhere. But the rating services do not give us a good handle on exactly where it is going.

The CHAIRMAN. I assume Mr. DeAngelis's competitors, the local cable company, are in it to make a profit also. They must have some idea that somebody is watching or paying them for because they can afford to outbid Mr. DeAngelis for the movies.

Mr. PUTNAM. This is true. It is just that I do not have available to me anyway a concise answer to your question. I know it does exist.

Mr. HENDERSON. Let me try to clarify that, Senator. HBO is obviously a national service, and the motion picture producers have found a ready market at HBO, and product that heretofore came directly either off the network or off of the theatrical circuit came to the local television market individually across the country. Now the producers have elected to give a first exposure on HBO, or a simultaneous release, but with protected windows. In other words, where we could license heretofore for 5 or 6 years, as Mr. DeAngelis mentioned, today we will be able to license for 3 years or 5 years, but during certain specified periods.

They are under separate license to HBO, and we are precluded from using them.

The CHAIRMAN. I do not want to draw the question out too far. I just want to know if they are becoming a serious competitor. I know some of you own some cable. We have had some statements that cable really is irrelevant, and the Nation is not going cable, and cable is not going to make any difference because they are not a serious competitor.

Mr. HENDERSON. It is competition. It is recognized competition. Its effects have not yet been defined in terms of a revenue loss.

The CHAIRMAN. Bob?

Mr. TAFT. I suppose there is some competition in it, but I would like to clear up one area that I think may be confusing, and that is the relationship of number of homes wired to the pay cable area. What you are talking about here in market shares insofar as the original showing on cable is concerned is about 3 percent.

The CHAIRMAN. Again, that is not my point.

Mr. TAFT. I realize that, but——

The CHAIRMAN. Apparently, local cable is able to outbid Mr. DeAngelis for these old movies he used to get.

Mr. TAFT. Because they are aiming at a narrower audience which is paying for that particular product.

The CHAIRMAN. I understand that, but to Mr. DeAngelis, I am not sure it makes any difference if they are aiming at a narrow audience that pays for the product. They are competition for him. And in some cases he is losing.

Mr. TAFT. I think the answer to that is, if that indeed continues to be true, you will see the market react with additional production, and indeed it has been reacting with additional production.

The CHAIRMAN. Mr. Moll?

Mr. MOLL. I think there are two or three ways of looking at it. One is, HBO, the pay services, are competition in a rating sense in that they are one more alternative for people to watch. They diminish the available audience, offset the distribution of it, but I think they are measured more in terms of subscription. It is less important how you measure it in the traditional audience measurement sense, than how many homes pay for that service. That is a factor in the competition. And as the Senator suggests, it is also the element of devaluing the product. For example, a motion picture becomes available and it goes on HBO or Showtime first, and then it goes to the networks, and then it comes to the station. So at the local level the product finally gets to us enormously used up. That is competition.

Mr. COOKERLY. We have a situation here in the Washington market recently where we carry the ACC basketball games, and one of the better games was Maryland versus the University of North Carolina in mid-January. It was offered to us and then it was withdrawn and put on a pay cable regional network. That was a serious, not blow to us, but it was a disappointment to us to lose an event of that magnitude.

The CHAIRMAN. You mean they outbid you?

Mr. COOKERLY. No. Somebody out there did. The person who was supplying the program decided to put it on pay cable, made a business decision certainly to put it on pay cable rather than——

The CHAIRMAN. I should not say outbid. Whoever is producing this program—does the ACC produce it?

Mr. COOKERLY. They sublet it to somebody else who does it for them.

The CHAIRMAN. Is it fair to presume that they probably did that because they made more money on it that way than selling it to you?

Mr. COOKERLY. I think it is very fair to presume that, right.

The CHAIRMAN. Now, in that case, and you made some reference to this, Mr. Cookerly, and Mr. Moll slightly less, why would it not be of interest to the networks to start selling their product to cable or to pay or DBS if somebody gets into that production where they are not prohibited from syndication and financial interest rights?

Mr. COOKERLY. That is certainly one of my fears as a local television station operator, that the time could very likely come where

ABC would go to that place where they can get the most money for their product.

The CHAIRMAN. I would expect they would, just like the producer of this basketball game.

Mr. COOKERLY. Certainly. I think their area of expertise is in programing. That is what networks really are all about. And if they are precluded from getting downstream profits in our area, they certainly will go to another area.

The CHAIRMAN. You are right. Their expertise is in programing, and they are in the business to make money, and if they can make more money selling it to DBS or cable than they can through their affiliates, I would assume that is the way they will do it.

Mr. COOKERLY. Certainly.

The CHAIRMAN. Mr. Moll.

Mr. MOLL. Of course, we are seeing some of that already. The Masters and Wimbledon are shared by the networks with HBO, and it is driven in this case by the suppliers, if you would, by the Master and by the Wimbledon organizers who are hearing the opportunity to get greater money by spreading it out. So I think that the trend line is there, and so far the holding action is that we are at least sharing it.

Mr. TAFT. Senator Packwood, might I offer a comment on that? We have to take into account that in nine major markets in the United States, I do not know what percentage of the total United States that is, you have O&O stations owned by a network, operated by them, which are a very large portion of their revenues and profits, and to take the course that you are suggesting would fly against their own economic interests insofar as that is concerned.

The CHAIRMAN. It might in those markets, but what about the areas where they do not have the O&O? If they produce the program, and as far as selling it to pay or otherwise, they may look at the O&O and say——

Mr. TAFT. I have not found where they would be within the FCC regulations if they offered programs to their O&O's on a network basis that they did not offer to their other network affiliates.

The CHAIRMAN. But I take it no one here on the panel has any objection to their having a financial interest in syndication rights other than the present limitation under the rules. You do not care if they have financial and syndication rights on what they make for pay cable or DBS?

Mr. TAFT. The cases have already decided that they can do that, and they are doing so.

The CHAIRMAN. I understand that, but any of the rules can be changed. You have no objection to them having that interest in pay and in DBS?

Mr. TAFT. No; I do not think we do.

The CHAIRMAN. I might say to the affiliate representatives here, you do not have to convince, I think, me or any of us that you always are lackeys or not lackeys for the networks. I am sure if we were debating prime time access the affiliates might have a slightly different position from the networks. I have been through enough battles before to realize that sometimes you are with them and sometimes you are against them. But on no occasion could anyone wisely call you simply toadies for the networks.

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I have no other questions.

Senator GOLDWATER. Senator Wilson?

Senator WILSON. Thank you, Mr. Chairman.

Mr. Putnam, I am a little confused. Your first UHF station was where?

Mr. PUTNAM. In Springfield, Mass.

Senator WILSON. It is a network affiliate?

Mr. PUTNAM. It is a network affiliate. Our second one that I referred to is in Dayton, Ohio, and the station that I cited some other experiences from is in Salt Lake City.

SENATOR WILSON. And how long have you been operating an independent TV station?

Mr. PUTNAM. Five years.

Senator WILSON. Have you ever had the position with the NBC network affiliates board?

Mr. PUTNAM. Yes.

Senator WILSON And as your statement makes clear with commendable candor, you find yourself a notable exception in these two station groups to which you belong, your position on this.

Mr. PUTNAM. Well, I do not know how exceptional I am in terms of the actual position taken by the various members. I know that the position I have stated here is at considerable variance with the official position adopted by the associations themselves. I would also like to add, sir, that in terms of the investment we have made in our three stations, we have put more into developing the Salt Lake City station than into the other two.

Senator WILSON. Mr. Cookerly, I am frankly not sure that I understand really the full import of what you are getting at in your statement, the one that just occasioned Senator Packwood's interest. You state,

> The principal long-term effect of the syndication and financial interest rules will be to encourage the wholesale migration of expensive, innovative, and high quality television programing to pay cable or DBS.

Now, it was my impression that the networks have all taken that plunge, and that they have all gotten out of it.

Mr. COOKERLY. Well, it seems to me that as time goes on, that if I were ABC, and I had a certain amount of money to invest in an area where my expertise was, which was programing, that I am going to put that money and that expertise in an area where I am not prohibited from getting as much profit as possible.

Senator WILSON. What are you going to do about continuing to enjoy advertising revenues? Are you going to alter the quality of programing that would attract that?

Mr. COOKERLY. I am sorry. Say that again, please, sir.

Senator WILSON. Does the import of this really mean—Is the import of your statement here about this wholesale migration into pay or into cable, does that indicate that you are saying the networks are going to give up on free advertiser-sponsored television?

Mr. COOKERLY. Oh, I do not think they definitely would give up, at least not for the foreseeable future. I think they will continue, but I think they will be discouraged.

Senator WILSON. What would you consider to be the foreseeable future?

Mr. COOKERLY. That, of course, is a very good question, but I think they will be discouraged from putting more and more money into the prime time programing in particular, and that is my concern as a local station whose job is to serve the local community, that if the quality of the programing is less or is not as great as it could be, then we will not be able to do as good a job of serving the local community.

Senator WILSON. Let me ask you, sir, I do not know how long you have been affiliated with the affiliates. Were you with them at the time the networks were permitted the rights of syndication?

Mr. COOKERLY. Yes.

Senator WILSON. Did you ever experience this thing that Mr. Victory has described in his testimony before the FCC?

Mr. COOKERLY. No; I certainly did not, and if such a thing did happen, I certainly was not aware of it.

Senator WILSON. Well, I guess you already answered that question, but I take it from your answer that when you say, no, not in the foreseeable future, that you then would be at variance with the contention that is made by some that there is a real threat to the passage of free TV from the air waves.

Mr. COOKERLY. I think the erosion has already started. We have lost the championship boxing matches. We used to get the movies right after their theatrical releases. We used to have them on free television. We no longer have those. Things are moving at a very rapid pace, and I think that it is important that the networks, who are my primary supplier, that the networks be given every opportunity to compete with the other forms of distribution.

Senator WILSON. Well, let us look at the picture as a whole. We have lost the prizefights because there is no rerun value there. So it is an important thing. If I were in the pay business, I would bid high for that, too. But now let us just be honest. With the growth that has occurred in the independent television stations and in the number of independent producers, are you going to say that there is not a far greater fare available for the watcher of free television today than in the past?

Mr. COOKERLY. Far greater fare?

Senator WILSON. Yes, more stations, more programing.

Mr. COOKERLY. There certainly are more programs. There are more stations signing on every week, and I think it is true there is more programing at this point in time than there was a few years ago.

Senator WILSON. That is right, and this has all occurred during the existence of these rules.

Mr. COOKERLY. Well, that is true. It also has occurred, I think, though, because the economic base of the television industry has increased rather dramatically in the last few years since its inception, but consistently the economic base has grown, and as the economic base grows, it encourages more TV stations to sign on, and there is more money with which to buy product or to create locally produced programing.

Mr. PUTNAM. Senator, could I enhance that answer a little bit? One of the conditions that is not always obvious from the outside of our industry is that we live in an atmosphere of constant growth of inventory. That is, "I Love Lucy "is still available, and it is still

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economically viable, and so are a quantity of other off-network products.

Senator WILSON. Provided they are not warehoused.

Mr. PUTNAM. Provided they are not warehoused. Nobody warehouses "Lucy."

Senator WILSON. Well, they did for a time. And there is a great deal of difficulty with some shows even getting on the air. I think I would have to ask Mr. Cookerly and Mr. Moll if they do not agree with Mr. Taft's statement that this passage of free TV from the airwaves is a phony issue, and if they do not agree that the FCC would, as Commissioner Dawson suggested, not tolerate such a thing.

I think it is a phony issue, too, frankly. I do not think there is any great danger of the FCC's having to come to grips with that, to quote Mr. Cookerly, in the foreseeable future.

Mr. Moll, let me just ask you this. Are you a member of the board of the CBS affiliates organization?

Mr. MOLL. Yes, sir.

Senator WILSON. This board and the affiliate association of the other two networks support the repeal of FISR, the financial interest and syndication rule. Did your affiliate board and the others take a position on the prime time access rule?

Mr. MOLL. Yes, sir, we did.

Senator WILSON. What was that position?

Mr. MOLL. That was to leave it alone. To leave the prime time access rule intact.

Senator WILSON. Does it not seem to you strangely inconsistent that all three of those affiliate organizations support the prime time access rule which was adopted at the same time and for the same purpose as the financial interest and syndication rules, which is to protect competition, and yet you oppose the retention of the financial interest and syndication rules?

Mr. MOLL. Senator, I think that the prime time access rule has promoted competition. It has created the opportunity for new suppliers to enter the market, and I think releasing the financial interest rules would enable more suppliers to enter the market because of the additional financing. I think both of them are procompetitive.

Senator WILSON. Because of the additional financing?

Mr. MOLL. I think having three more people to participate in supporting the production of programing would create additional productions.

Senator WILSON. Sure, it could create additional production. Of course, the networks are not precluded from production now. They do produce. But if the reason to repeal the rules is to allow greater financing to come to those who are would-be producers in need of financing, I frankly think it is a pretty poor argument because of all of the concerns that have been recited this morning by the writers, by the actors, by the independents, and by the advertisers, all of whom feel that because of the market concentration and the control, the domination that they give the networks, it reduces competition and therefore reduces diversity, it reduces the range of choice to the American viewer of free television, and increases

costs to the advertiser, and therefore increases the price of the product to the consumer.

Mr. MOLL. Senator, it seems to me that there is an enormous need for product. Perhaps another personal illustration of it, I mentioned our Jacksonville market, 64th market. When you look at all of the syndicated programing which is available in that market, I cannot give you a precise percentage, but I am going to estimate something like 85 percent of the available product in the market is currently under contract. We have severe limitations on our ability to get new programing on all of those stations, independents, network affiliates as well.

It seems to me that having more opportunity for independent program suppliers to enter the marketplace, creating more product, would tend to drive prices down in addition to creating the diversity, not only on free television but in that entire spectrum of the new technologies, the cable services as well.

Senator WILSON. Do you know what the market share in Jacksonville is for the three network affiliates?

Senator GOLDWATER. The time of the gentleman has expired.

Senator WILSON. Excuse me.

Mr. MOLL. Do I know the market share?

Senator WILSON. Mr. Chairman, perhaps he could just supply for the record the answer of what the market share of the three network affiliates are in that Jacksonville market.

Mr. MOLL. Yes; sir, it is about 80 percent.

Senator GOLDWATER. Just one comment. Sometimes we tend to drift away from the reasons for this hearing. Because of my interest in cable, and we have gotten into the discussion of cable probably more than we have whether the rules should stay or not, I would just like to make a comment on the health of the cable industry as I see it.

Broadcasting magazine reported in May that HBO and WTBS in Atlanta were both doing worse than their 1982 levels. I would note that Dr. David Poltec, vice president of research for CBS Broadcast Group, was quoted on May 24 as saying, "The cable revolution looks more and more like isolated guerrilla warfare." From this it is hard to conclude that the new media presents a serious threat to the networks, whatever competition cable may present to independent stations.

The real question is whether cable will grow so big that it will injure the networks so much that the networks need repeal of the FCC rules to compete with the new media, not whether cable is strong enough to injure independent stations. The independents say they need the rules to compete with the networks, and I would just like to finish that comment on cable. The big threat to cable is not found in you people. It is not found in the independents or in the networks. It is found in the cities of this country who are doing everything they can do to prevent cable from growing. So, if we want to keep this industry, the communications industry, growing, maybe we have to bring some new faces into the governments of our cities. They do not seem to understand. That is all I have.

The CHAIRMAN. I have no further questions.

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Senator GOLDWATER. Gentlemen, I want to thank you on behalf of the committee for taking time to come here and give evidence. It will be invaluable.

We have a single witness now, Mr. David Londoner, vice president of research department, Wertheim & Co., Inc., from New York.

You may be seated, Mr. Londoner, and proceed. Your whole statement will be printed in the record, if you would just like to comment.

STATEMENT OF DAVID LONDONER, VICE PRESIDENT OF RESEARCH DEPARTMENT, WERTHEIM & CO., INC., NEW YORK, N.Y.

Mr. LONDONER. Thank you, Senator.

I am an investment analyst with Wertheim & Co., a New York-based investment banking and brokerage firm, and for over 15 years have specialized in analysis of the entertainment industry. I analyze the stocks in the broadcasting, motion picture, and cable television industries in order to provide investment advice to our clients who are principally institutional investors.

What I am going to say to you today is likely to be interpreted as more favorable to the positions of the networks on the one hand and of the independent broadcasters on the other. I realize that these two groups can be considered to have opposing interests at this hearing, and I find certain merits in each of their positions.

Program diversity to me is not an issue. Creativity is not an issue. Warehousing, or actually a better word for that would be control of programing, is an issue, and the apportioning of risk and reward in program production is an issue.

In the financial interest question, I think the question here is whether the profits or losses should accrue to the risktakers or elsewhere. As a standard rule in Hollywood, the ultimate profit on a motion picture or another creative enterprise, half of the profit typically goes to the talent, and half goes to the money. Now, that rule is a starting point for free market negotiations on most projects, and most deals end up with some variation from that rule, but the rule serves as a reminder that there are two equally important elements in the production process.

In original series, networks pay for substantially all the costs of production. Some shows are deficit financed by the studio.

The CHAIRMAN. What did you say? The networks what?

Mr. LONDONER. In original series, the networks pay for substantially all the costs of production. Some shows are deficit financed——

Senator GOLDWATER. Pardon me. Do the networks pay anything for the authority to be networks? Do the networks pay the Government anything for the privilege of working as a network?

Mr. LONDONER. Do the networks pay the Government anything for the privilege of working as a network?

Senator GOLDWATER. Yes.

Mr. LONDONER. Not meaningful amounts.

Senator GOLDWATER. Do the networks have a license?

Mr. LONDONER. Networks do not have a license to the best of my knowledge. It is the stations that have a license.

Some shows are deficit financed by the studios or production company, but I think the important point here is that the budget usually includes heavy overhead charges for the studio. The non-network revenue stream nearly always or I should say very often includes immediate foreign television sales, and there is an investment tax credit available to the owners of the product which all together usually produce a break even or profit immediately.

In my view, if they are taking the risk on the shows, the networks are contributing one of the two important elements in the production process, the financing, and should be allowed to have an interest in the profits to that extent. On the syndication issue, I am sympathetic to the potential problems for independent broadcasters. A network could be tempted to warehouse product to keep it from appearing on independent stations and competing with the network itself.

I think the considerable success of the independent stations in taking audience away from the networks over the years has been the direct result of the showing of off-network shows such as "MASH"and "All in the Family." It has also clearly resulted from an expansion in the total marketplace and a greater demand for television advertising, but there would presumably be an incentive for the networks if they controlled or influenced the course of syndication sales to have the popular off-network shows exhibited on their own affiliates rather than on independent stations which might choose to play them in prime time, perhaps, opposite the network's originally programing.

Because of the complex financial relationships between a network and its affiliates, it would be relatively easy for the networks to influence the marketplace for syndicated programing. I believe that some restrictions should be placed on the network control of syndicated sales to ascertain that product is not held back from independent stations, and that the bidding process remains uninfluenced by considerations other than the best possible price.

The FCC, by proposing to prohibit the networks from influencing syndication sales, appears to have taken care of that issue until 1990, when all restrictions would lapse. I am comfortable with that, because I think that by 1990 there will be so many more means of distributing product, cable networks, both pay and advertising supported, direct broadcast satellite, TIDS, and ad hoc networks over traditional broadcast channels, that competitive positions will dictate the market in an even stronger fashion than today.

But it might be wise for the FCC to hold further hearings in 1988 and 1989 to determine whether these conditions have in fact changed, as I expect they will.

In summary, I am a believer in a free market approach to financial interests, one which returns to the networks their right to negotiate with producers for a financial interest in the programing. I also believe in a similar approach to the syndication issue, a free market bidding process for those rights, and I believe that the network control might actually undermine the free market process in that case.

These views are consistent with my personal preference for minimal Government restrictions on commercial transactions. The issue at hand, I think, is one of channeling a portion of the stream of

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profits from program production. My personal view is that the Government should not have placed dams in those streams 13 years ago by these issues, and that the FCC is correct in now opening them up.

Thank you.

[The statement follows:]

STATEMENT OF DAVID J. LONDONER, VICE PRESIDENT, RESEARCH DEPARTMENT, WERTHEIM & CO., INC.

I am flattered that the Committee is interested in my views on the Financial Interest and Syndication issues, and I am pleased to deliver these comments.

I am an investment analyst with Wertheim & Co., Inc., a New York based investment banking and brokerage firm, and for over fifteen years have specialized in analysis of the entertainment industry. I analyze the stocks in the broadcasting, motion picture and cable television industries in order to provide investment advice to our clients, who are principally institutional investors.

I do not represent a constituency at these hearings, and our clients own securities of companies on all sides of the issues before you.

What I will say to you today is likely to be interpreted as more favorable to the positions of the networks in one area and of the independent broadcasters in the other. I realize that these two groups can be considered to have opposing interests, and I find certain merits in each of their positions.

I think it is helpful, first, to dispense with some of the rhetoric which has accompanied this inquiry in the public posturing of the parties: program diversity is not an issue; creativity is not an issue; warehousing of programming is an issue; and the apportioning of risk and reward in program production is an issue.

I would emphasize strongly that I see no direct public involvement discernable in the true issues involved here, merely opposing commercial interests. The public will receive the television programs it wishes regardless of who shares ownership of the productions.

There are large and profitable enterprises represented on all sides of these issues, and the question is whether the United States Government or the private marketplace will determine the proper allocation of a small portion of the profits from program production.

The issue at hand is the roughly $800 million of annual revenues from the domestic distribution of television programming. This $800 million is divided as follows:

About $350 million is paid for distribution—the cost of marketing these programs to local stations, contracting, delivery, and collection from which a profit of about $75-$100 million is derived by the syndicators;

about $150 million is paid to the talent—stars, directors, writers, etc. in the form of participations, guild fees and residuals;

and about $300 million is profit distributed to the owners of the shows, most of which is shared between the studios and individual producers or their companies.

In the financial interest controversy it is that last $300 million which is in question. In the syndication issue, it is both the $75-$100 million of profit on the first $350 million, as well as the market power which might be wielded by the networks if they were allowed to direct the flow of those programs after the network license expires.

In the financial interest issue—the $300 million—the question is whether the profits or losses should accrue to the risk-takers or elsewhere.

There is a standard rule in Hollywood that of the ultimate profit on a motion picture or other creative enterprise, half of the profit goes to the talent and half goes to the money. That rule is the starting point for free market negotiations on most projects, and most deals end up with some variation from that starting point. The rule, however, serves as a reminder that there are two equally important elements in the production process.

In original series, the networks pay for substantially all the cost of production. Some shows are deficit financed by the studio or production company, but the budget usually includes heavy overhead charges for the studio; the non-network revenue stream nearly always includes immediate foreign television sales, and there is an investment tax credit available to the owners of the product which, all together, usually produce a breakeven or profit immediately. Since the networks fund the production outlays with advances, the studios typically do not have a meaningful cash outlay themselves.

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Under F.C.C. rules still in effect, the networks are not permitted to share in the ultimate profits from these shows, or in the investment tax credits generated by them, because they have no financial interest in the shows unless they produce them entirely in-house.

In my view, if they are taking the risk on the shows, they are contributing one of the two important elements in the production process--the financing—and should be allowed to have an interest in the net profits to that extent. In a free marketplace, the networks, which have already undertaken a substantial portion of the risks, would negotiate for the right to share in the rewards. Their bargaining position is such that they would probably be able to negotiate deals whereby they end up with about a 20 percent–40 percent share in the ultimate profits. If that is so, the networks can be expected to increase their annual pretax earnings by perhaps $20–$40 million each, about five years from now, if the rules are permitted to lapse as the Commission has proposed.

The three networks are under a serious competitive strain from the independent stations and from the pay networks, all of which are allowed to have financial interest in the programming they exhibit. It is necessary for them to find ways of reducing costs or adding revenues, because, unlike their competitors, profits have not been expanding.

One way is for them to assume some of the ultimate reward from the programming they already fund financially. These rewards will be purchased with increased risk capital.

In addition, partial ownership would give the networks oversight during the production process. If the financial figures were to be shown to the networks, it would almost surely result in lower costs. In terms of public policy, allowing the networks to have a financial interest would most likely result in the creation of additional production entities which would compete with the existing majors and the four large non-major television production companies.

I am consequently in favor of allowing network to negotiate for an interest in the programming.

I come down on the other side of the syndication issue, however. While as a general rule, the owners of a product should be allowed to distribute it to their best advantage, there is a potential dichotomy between the interests of a network as a program owner and the others who would have a financial interest in the projects.

The networks argue that it would be to their advantage to seek the highest bidder for the programming in which they have a profit interest, and that controlling the syndication rights, or influencing them, would not frustrate the free market. I am skeptical of this claim.

A network could be tempted to "warehouse" product to keep it from appearing on independent stations and competing with the network itself. The considerable success of the independent stations in taking audience away from the networks has been the direct result of their showing off-network shows such as M*A*S*H" and "All in the Family." It has also resulted from an expansion in the total marketplace and a greater demand for television advertising. There would presumably be an incentive for the networks, if they controlled or influenced the course of syndication sales, to have the popular off-network shows exhibited on their own affiliates, rather than on independent stations which might choose to play them in prime time opposite the network's original programming.

Because of the complex financial relationships between a network and its affiliates, it would be easy for the networks to influence the marketplace for syndicated product. I believe that some restrictions should be placed on the network control of syndication sales to ascertain that product is not held back from independent stations and that the bidding for product remains uninfluenced by considerations other than the best possible price.

The F.C.C., by proposing to prohibit the networks from influencing syndication sales, appears to have taken care of that issue until 1990, when all restrictions lapse. I am comfortable with that, because I think that by 1990 there will be so many more means of distributing product—cable networks, both pay and advertiser supported, direct broadcast satellite, MDS and ad-hoc networks over traditional broadcast channels—that competitive conditions will dictate the market in an even stronger fashion than today. But it might be wise for the F.C.C. to hold further hearings in 1988 or 1989 to determine whether these conditions have in fact changed as I expect they will.

In summary, I am a believer in a free market approach to financial interest, one which returns to the networks their right to negotiate with producers for a financial interest in the programming. I also believe in a similar approach to the syndication

issue—a free market bidding process for those rights—and I believe that network control might actually undermine the free market process.

These views are consistent with my personal preference for minimal governmental restrictions on commercial transactions.

The parties involved on all sides of the transactions under consideration here are for the most part powerful, sophisticated and well financed. We are not dealing with infant industries or beleaguered companies in need of government assistance.

The issue at hand is one of channeling a portion of the stream of profits from program production. My personal view is that the Government should not have placed dams in those streams thirteen years ago, and that the F.C.C. is correct in now opening them up.

Senator GOLDWATER. Thank you.

Mr. Packwood?

The CHAIRMAN. Thank you.

Mr. Londoner, I want to make sure I understand what you do. You work for Wertheim and are an expert in the values of broadcast properties, television companies, motion picture companies. Is that a fair statement?

Mr. LONDONER. Not quite in broadcast properties, Senator. What I do is, I analyze the securities, the publicly traded securities of companies in these industries and make evaluations to our clients as to whether they should buy or sell.

The CHAIRMAN. Many of your clients are institutional investors?

Mr. LONDONER. Substantially.

The CHAIRMAN. That means big insurance companies, big pension funds?

Mr. LONDONER. Exactly.

The CHAIRMAN. You will say to them, I think you should buy or sell CBS, or I think you should buy or sell Gulf & Western.

Mr. LONDONER. Correct.

The CHAIRMAN. Or Paramount. Is Paramount traded separately?

Mr. LONDONER. Paramount is part of Gulf & Western. You cannot any longer buy shares in it.

The CHAIRMAN. But basically you make decisions based upon your best judgment as to what would be most profitable for your clients to buy and sell.

Mr. LONDONER. Precisely.

The CHAIRMAN. And on occasion, do you recommend that they buy and sell what we would call producer companies, and on occasion buy and sell what we call network companies?

Mr. LONDONER. Yes, that is correct.

The CHAIRMAN. So you have a pretty good idea, assuming your analysis is correct, as to hopefully what will and will not be profitable or otherwise you would not stay in your business very long.

Mr. LONDONER. That is what we try to do, sir. I cannot tell you——

The CHAIRMAN. And you have no particular ax to grind one way or another. You are not involved in owning television stations or producing films or anything else?

Mr. LONDONER. That is quite correct.

The CHAIRMAN. If the rules are not changed, as suggested in the FCC's tentative decision, but remain in place, in your judgment what is the long range financial impact on free television?

Mr. LONDONER. If the rules remain in effect, I think it would change it to some extent. I do not think this is a do or die issue for

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free television. I think that to the extent that the networks have the right to own programing, that will give them the opportunity somewhat to reduce costs of programing, and to share in some of the aftermarket profits which will make the networks relatively more strong and give them a better ability to compete in this increasingly difficult marketplace.

I do not think that if the rules stay in effect, the networks are going to go out of business.

[The following information was subsequently received for the record:]

WERTHEIM & CO., INC.,
MEMBER, NEW YORK STOCK EXCHANGE, INC.,
New York, N.Y., November 10, 1983.

Hon. BOB PACKWOOD,
Committee on Commerce, Science, and Transportation, Telecommunications Subcommittee, U.S. Senate, Washington, D.C.

DEAR SENATOR PACKWOOD: I have reviewed the transcript of my testimony before the Telecommunications Subcommittee on November 4, 1983 and wish to clarify for the record the answers to two questions in particular. In response to your question that begins on line 20, page 136 of the official transcript, please insert the following in lieu of my previous response:

"If the rules remain in effect, I think these will be, to some extent, a negative effect over the long term. I do not think this is a do or die issue for free television in the short run. I think that to the extent that the networks have the right to own programming, which will give them the opportunity somewhat to reduce costs, and to the extent that they are able to share in some of the aftermarket profits, this will make the networks relatively stronger and give them a better ability to compete for programs in this increasingly difficult and highly competitive marketplace. While I do not think that if the rules stay in effect the networks will go out of business, there is no question in my mind that there will be a negative impact in the long term because the rules diminish competition and lead to higher prices for programs."

In response to the question you asked that begins on line 10, page 137, please insert the following in lieu of my previous response:

"While I cannot be absolutely certain, those special events may well go to pay cable television. I think that the bargaining power of cable television, particularly the pay cable networks such as HBO, is such that ultimately they will be able to take a number of the key events away from free television. Now, there may be some legislative action that speaks to that at some point, but I think the economic power of something like HBO is becoming a very major factor in the industry and could result in some of these big events moving to pay television."

I appreciate your assistance in allowing me to clarify my responses to these questions so that the record is clear and complete as to my thoughts.

Sincerely yours,

DAVID J. LONDONER.

The CHAIRMAN. Now, what is going to be the impact on the type of programs that are on free television, Olympics, the Superbowl, if the rules stay as they are? What is going to happen?

Mr. LONDONER. I am not altogether certain, sir, that those special events are not going to go to cable television under any circumstances. I think that the bargaining power of cable television, particularly the cable networks such as HBO, are such that ultimately they will be able to take a number of the key, call them events, away from free television. Now, there may be some legislative action that speaks to that at some point, but I think the economic power of something like HBO is becoming a very, very major factor in the industry.[1]

[1] See letter above.

The CHAIRMAN. Let me ask you something financially. The argument has been made about market shares, and the networks say that is not the issue solely, it is purchasing power. Is that a fair argument? When they are bidding, those who are opposed to the networks say they have 80 percent of the market, and the network will say it does not matter if we have 80 percent of the market if we get outbid by HBO.

Mr. LONDONER. I understand your question. Yes, that is very much a question. The bidding for a particular program from advertiser-supported television is limited by the nature of the number of people that it can reach and the amount of money that an advertiser can spend for a 30-second spot. There is a limit: the limit grows, but there is a limit. To the extent that pay television can put more dollars into that stream, that gives it a more competitive force without necessarily having the same audience.

The CHAIRMAN. I would assume that is exactly the situation faced by Mr. DeAngelis in his bidding for the movies. My hunch would be that cable television does not have as big a share of the market as the stations maybe, but if they have enough subscribers to pay $7, $9, $10, $15 a month, they have enough cash to outbid Mr. DeAngelis, even if they have a solid portion of the market.

Mr. LONDONER. That is precisely correct, except that the purchasing goes through the television network, not the local cable operator.

The CHAIRMAN. But it is very important to emphasize that share of the market is not the decisive factor in how much cash you have to bid for programs.

Mr. LONDONER. That is quite correct.

The CHAIRMAN. Thank you. I have no other questions. I found your statement most interesting.

Mr. LONDONER. Thank you, sir.

Senator WILSON. Mr. Londoner, what share of the made for television programing is purchased by the networks?

Mr. LONDONER. What share of made for television programing is purchased by the networks?

Senator WILSON. First time programing.

Mr. LONDONER. In terms of number of hours, that is a very difficult question to answer, because there are all kinds of programing made for television at the local levels which creates lots of hours but does not create lots of dollars. I do not know the precise answer to your question in terms of dollars, but I guess that the networks probably purchase in dollar terms 75 to 80 percent of the programing.

Senator WILSON. Prime time?

Mr. LONDONER. Oh, of prime time? All right. We are going to have to start all over again, Senator. Give me the question, because I think I have just lost some of the train of your question.

Senator WILSON. How much of made for television first-run programing for prime time is purchased by the networks?

Mr. LONDONER. Oh, the very, very large amount of it, better than 90 percent. I cannot tell you all, because I am quite sure that some of the independent stations do prime time programing that is originated by them.

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Senator WILSON. When the networks are involved in production, to the extent that the studios do not pay additional costs, as we have heard several of them recite in several specific instances, the networks pass their costs on to their advertisers, do they not?

Mr. LONDONER. They try to. It is a difficult process. The networks simply do not tack on a percentage profit to their shows and bill the advertisers that kind of cost-plus number. It is a bidding process for advertising. There are times when networks lose money on programing and there are times when——

Senator WILSON. They lose some, they make some, but over time that rate card has to necessarily reflect their experience, which reflects their production costs. It is an element certainly.

Mr. LONDONER. It is certainly an element. You are getting into an economic argument that I am a little less comfortable with in those relatively simplistic terms. This is a bidding process, and I think that the bidding process is taken up not only by the networks for advertising time, and I am not talking about the bidding process for the shows that we talked about before, but there is a bidding process that competes with other media, local television, newspapers, magazines, et cetera, and I suppose it is conceivable that at some point the cost of producing the shows that people would want to watch could get to the point where the networks could make very, very little money on that program.

I think you have seen, and this may not be directly responsive to your question, but I think it is an important point, I think you have seen that in the last 5 years, the network profits of all three networks aggregated together have been essentially flat on rising revenues. If you take NBC, CBS——

Senator WILSON. How about last year?

Mr. LONDONER. Last year——

Senator WILSON. I read several annual reports yesterday that reported record revenues.

Mr. LONDONER. Revenues, yes. Revenues are going up virtually every year.

Senator WILSON. Also profits. NBC—this is their annual report. This is just from broadcasting. It is profit before taxes on income. They went from $48.1 million in 1981 to $107.9 million in 1982.

Mr. LONDONER. We were talking about the network. The vast majority of that is their local stations, their owned and operated stations, to the best of my knowledge. They do not break out those figures for financial analysts, unfortunately, but to the best of my knowledge, if you take a look at the three networks, just the networks, not their owned and operated stations, and put them together for 5 years, I believe you will see roughly a flat pattern throughout that period. I do not mean that it does not fluctuate, but it certainly is not growing nearly as fast as revenues.

Senator WILSON. Well, if their profits have been flat, what percentage profits have they enjoyed?

Mr. LONDONER. The networks in aggregate, and this is not a figure that I have worked up for this inquiry, but the networks aggregate about a 9 to 10 percent profit margin on their revenues. The more profitable networks, CBS, ABC, are somewhat higher than that, ABC meaningfully so, but NBC, for a number of years,

the network, to the best of my knowledge, did not make a profit, and that pulls the average down.

Senator WILSON. That is contradicted by the testimony we heard the other day.

Mr. LONDONER. Those figures, sir, were available up until, I believe, a year ago at the FCC. They are not public knowledge, and I do not know those specifically, but I do believe that the FCC had the figures for the individual profits of the three networks, which I presume you could get.

Senator WILSON. From your knowledge of the business, do you think that free television is in any danger of passing from the air waves?

Mr. LONDONER. Not for a long time, sir. I think free television is still a healthy business. I think the networks are a less healthy business, and this has been true for many years, than the stations. The stations are a very healthy business, very wide profit margins, by and large, and I do not think that free television is in danger of vanishing from the scene by a long shot.

Senator WILSON. Let me ask you this. In your testimony, you have said in your view that their marketing position, speaking now of the networks, is such that they would probably be able to negotiate deals whereby they end up with a 20 to 40 percent share in the ultimate profits. How does that relate to their financial interests?

I read this morning that in bargaining, CBS has made a compromise offer to limit its financial interest to 49 percent.

Mr. LONDONER. I did not read that, sir. I would like to know what it refers to, that 49 percent.

Senator WILSON. That is their offer.

Mr. LONDONER. Their offer to?

Senator WILSON. CBS's offer to the independent producers.

Mr. LONDONER. Was 49 percent, for a particular show?

Senator WILSON. No, all shows. In other words, I think that should be their financial interest, up to 49 percent.

Mr. LONDONER. Up to 49 percent? I am afraid I am just at a total loss in knowing the context of that, sir.

Senator WILSON. Does that strike you as fair?

Mr. LONDONER. Would 49 percent strike me as fair? I think as a bargaining point, I think that is probably where they might start off. It does not mean it is going to end up there. I think you have to realize, sir, that there are two sides to this process. The creative side is terribly important, and I think it is a matter of very, very considerable importance to the networks that they get shows that are going to play well. The creative talent in Hollywood does this, not the networks, and they are a terribly important part of that process. I think their bargaining power is a very, very strong one, and I think that somewhere the networks, for putting up the money, will be able to bargain with the creative talent for putting up the talent, and the resulting level of financial interest will come out somewhere in between.

Senator WILSON. Were you here earlier this morning when Mr. Bennett testified?

Mr. LONDONER. Yes, sir.

Senator WILSON. Do you agree with the point that he made in response to Senator Packwood's question that those that have a fi-

nancial interest might by virtue of their financial interest affect syndication?

Mr. LONDONER. I do not think so, sir.

Senator WILSON. Why not?

Mr. LONDONER. To my knowledge, the networks have always been extremely responsive to the laws of the country and to the promulgations and rules of the FCC. If they were not allowed to dictate in any way the course of syndication, the risk to them is so great in violating that rule that they would not take it. I think the history of the networks in that sense has been quite exemplary in not running afoul of the Commission's rules.

Senator WILSON. Did you hear the comment from Ms. Gurian about the rule for 35-year-old writers?

Mr. LONDONER. I heard that. I simply have no knowledge of it.

Senator WILSON. Do you have any knowledge of the practice—I know you are not for the repeal of the syndication rule, but I just wondered if you had any knowledge of the practice alluded to by Mr. Victory in his testimony before the FCC of release or offerings to network, O&O's, and affiliates prior to the release to the general market, including the independents.

Mr. LONDONER. It is not something that I would be involved in, Senator.

Senator WILSON. My time is running out. Thank you.

Senator GOLDWATER. Mr. Londoner, thank you for coming. I think it is very valuable for any hearing to have the opinions of an independent, a man who is on neither side, and to keep in that vein, I have another independent study done by Dr. Walter Bolder of Bolder, Nelson, of Bethesda, Md., which I will make a part of the record by reference.

This study was undertaken in the fall of 1982 as an independent project. Its purpose was to assess from a public interest perspective the development and status of the commercial television industry and the feasibility of deregulation. Criteria included achievement of the objectives of diversity, competition, and over the long term full marketplace determined resource allocations.

And there is some more on that that will be in the record, and the conclusions, which will be printed in their entirety, and they are not long. The major findings reached as a result of the investigation, research data, and other materials examined, analyzed, and presented in this study include the following:

> The syndication and financial interest rule has had a positive effect on competition and diversity in the program supply and distribution markets, particularly with respect to the independent television stations.
>
> However, these phenomena have only recently begun to develop to the point at which the full realization of the rule's potential can be foreseen. Total removal of the rule at this time would most likely inhibit, if not reverse, the positive forces that have been set in motion.

As I indicate, the balance of the conclusion, only three pages will be printed in the record.

[The material referred to follows:]

* * * * * * *

SECTION VIII

CONCLUSIONS

Major findings reached as a result of the investigation, research, data, and other materials examined, analyzed, and presented in this study are:

(1) The syndication and financial interest rule has had a positive effect on competition and diversity in the program supply and distribution markets, particularly with respect to the independent television stations. However, these phenomena have only recently begun to develop to the point at which the full realization of the rule's potential can be foreseen. Total removal of the rule at this time would most likely inhibit, if not reverse, the positive forces that have been set in motion.

(2) The major networks have retained their dominant position in the purchase of video programming. This has been accomplished through the combination of the networks' preponderant affiliation with television licensees that possess superior technical, and economically non-replicable, VHF coverage and the networks' strategic position in the leading commercial markets through their owned and operated stations. The networks' dominance in advertiser supported television is not threatened, in any meaningful respect, by independent television stations which, collectively, continue to occupy a relatively small proportion of the advertiser supported video broadcast market.

(3) Forecasts, in large part provided by the networks, strongly suggest that the major networks will continue to enjoy sustained growth through the 1980s. Public statements have been made by network executives that they do not consider new video outlets to be serious competition during the balance of this decade.

(4) New video distribution outlets which will begin to become important during the 1980s will still not threaten major network dominance. The major networks will continue to have the financial power to purchase leading talent, take the bulk of the video advertising market, have almost universal domestic market penetration, and will continue to occupy a powerful position in the determination of the programming content which is made available to the American public. In this respect, the major video networks present public policy issues which continue to be unique.

(5) The major networks have staked out initial positions in alternative video program outlets, thereby addressing the strategic possibility that their forecasts may be inaccurate and that emerging distribution alternatives may ultimately present a more substantial threat than is presently the case. By being thus positioned, audience diversion to the new media will not necessarily correspond to a reduction in the networks' market power.

(6) If the syndication and financial interest rule is removed today, effects on independent stations will be particularly detrimental because of the strategic role that syndicated programming occupies in the daily schedules of the independent stations. Removal of the SFIR will serve to permit the major networks to sap the financial strength of their major competitors (the independents) by permitting future reductions in the amount of syndicated programming which will be available. These effects would most likely be felt before the independent stations have attained sufficient economic strength to mount production efforts comparable to those of the major networks.

(7) Removal of the syndication and financial interest rule must be tied to actual market developments. Decisions which are based upon postulated assumptions, and the operation of pure economic theory upon those assumptions, should not be viewed as responsibly satisfying any reasonably public interest standard under the Communications Act when those assumptions and theories demonstrably conflict with actual market conditions and operations.

(8) Economically efficient outcomes, which are the usual objectives of micro-theoretic reliance on "market forces" to produce higher levels of social welfare, cannot by assumption be ascribed to the monopsonistic/oligopsonistic market structure which presently exists in advertiser supported television. Indeed, should regulation be removed in the "hope" that market conditions will evolve into a truly competitive market structure, it is more likely than not that the exact opposite will occur.

(9) Antitrust law enforcement cannot be solely relied upon to ensure evolution toward competitive market conditions. Public antitrust enforcement efforts are likely to be less well financed in constant dollar terms than was the case in the past. Even if this were not true, antitrust litigation is an inherently inefficient, and extraordinarily expensive, mechanism for attempting to foster competitive conditions in the program acquisition/distribution market. In brief, the SFIR is more resource efficient than the institution of individual antitrust suits.

(10) The growth of new media, even over the long run, will depend upon audience shares and the availability of programming, rather than upon technological feasibility. Thus, programming appears to be the ultimate bottleneck to full competition in the video distribution market, rather than the number of alternative outlets which are available to distribute that programming. In a multichannel video broadcast market, no single video broadcaster could exercise any market power without appropriate programming. It is through programming that the major networks are able to dominate the advertiser supported video broadcast market. The extended coverage provided by VHF affiliates assists the major networks in forestalling effective competition. VHF stations by themselves, however, do not individually possess market power of any consequence in their own video distribution market in the absence of appropriate programming.

(11) The SFIR plugs loopholes in the network consent decrees in the foreign and domestic syndication areas, and is not merely duplicative of the consent decree provisions.

RECOMMENDATIONS

The following recommendations are made in light of the statistical information and other daa which were obtained during this investigation and the Commission's stated policy objectives. The recommendations are made from the standpoint of the long-term interests of consumers and the Commission's desire to promote consumer choice, rather than from a short-term or transitory perspective. The financial well-being of suppliers of programs or commercial delivery systems has not been a criterion.

(1) The Commission should continue to strive toward deregulation of commercial television markets by fostering truly competitive market conditions. These efforts should be objectively based upon audience share, technology, entry barriers and other characteristics that distinguish the media involved.

(2) Deregulation should be based on actual conditions rather than hypothesized conditions or theoretical premises.

(3) The networks should be prevented from extending their monopsony power. The syndication and financial interest rule as written does not constitute a complete solution and alternative mechanisms should be considered. These include strictures on relationships between the networks and owned and operated stations and the networks and network-affiliated stations. To the extent that networks are permitted to engage in cross-ownership of new media, structural solutions should be considered.

(4) The Commission should develop objective standards by which market power can be assessed. Those efforts should include the development of numerical standards as well as continuing review of contractual terms and business practices employed by the networks. If need be, the Commission should be prepared to facilitate the release of programs to non-network syndication.

(5) The SFIR has had beneficial competitive effects and should be continued insofar as the major networks are concerned.

(6) The scope of the SFIR should be reduced so that those rules are only applicable to the dominant networks (ABC, CBS, and NBC). Application of the SFIR to nascent networks is not justified given the lack of market power which such entities possess.

(7) Because "spin-off" rights to continuing and non-continuing characters are not an inherently integral position of the network program acquisition process, the major networks should be barred from acquiring, as part of any transaction or transactions which involve the acquisition or continuation of a program, any right or rights in separate program developments which involve either continuing, or non-continuing, characters.

PREFACE, AUTHOR'S BACKGROUND AND ACKNOWLEDGEMENTS

This study was undertaken in the fall of 1982 as an independent project. Its purpose was to assess from a public interest perspective, the development and status of the commericial television industry, and the feasibility of deregulation. Criteria included achievement of the objectives of diversity, competition and, over the long term, full marketplace-determined resource allocations.

As a methodological approach, the study initially analyzed network practices and the industry conditions which prompted the Commission to adopt the SFIR in the early 1970s. It then examined the development of commercial television under the SFIR in the 1970s. It then examined the development of commercial television under the SFIR in the 1970s and early 1980s. Subsequently, the Department of Justice's antitrust consent decrees with the networks were reviewed. Next, the study considered the evidence and methods employed by the Network Inquiry Special

Staff in reaching its conclusions, as well as the more recent industry analyses of the staff of the House of Representatives' Subcommittee on Telecommunications, Consumer Protection, and Finance. Finally, the study incorporated forecasts of future industry development, particularly of the new video technologies, in reaching its conclusions and policy recommendations.

In preparing this study, the author employed public and private data sources, and the body of professional and industry literature which pertains to this topic. Personal assessments of present and future trends were obtained from professional and industry leaders, and information was exchanged with experts in several specialties. Appreciation is expressed for the assistance which those people provided.

All analyses, charts, writings, and study materials were developed independently by the author. The conclusions, recommendations, and other views expressed are strictly those of the author, and are the author's sole responsibility.

Walter G. Bolter received a B.M.E. from Georgia Institute of Technology in 1965. In 1968, he received a Master of Science of Industrial Management from Georgia Institute of Technology, with emphasis in the areas of accounting and finance. Other graduate work included two degree programs in economics at the University of Maryland, where he received a Master of Arts in 1971 and a Ph.D. in 1973.

Dr. Bolter has professional licenses in Maryland and West Virginia as a Certified Public Accountant. He has attained Professional Engineer-Engineer in Training status in Georgia, New Jersey and Pennsylvania.

While in graduate school, he taught finance and accounting at Georgia Institute of Technology and statistics and economics at the University of Maryland. He also taught accounting, management and economics at Montgomery College. Most recently he has been a member of the faculties of The George Washington University in the areas of telecommunications policy and economics, and the University of Maryland in the area of accounting.

Dr. Bolter is a member of the American Society of Mechanical Engineers, American Institute of Certified Public Accountants, American Economic Association and other professional societies.

He has experience in several industry and governmental fields, as well as in private consulting. He has served in the capacity of independent consultant for over two years, performing studies and analyses and offering other services in many international and domestic areas of communications, as well as the postal and other industry sectors.

During the 97th Congress, he served as Chief Economist of the House of Representatives Subcommittee of Telecommunications, Consumer Protection, and Finance.

He was a member of the staff of the Federal Communications Commission from 1975 to 1979, holding positions as Senior Economist in the Common Carrier Bureau, Office of the Bureau Chief, and at the policy level for the Commission in the Office of Plans and Policy.

In 1978 and 1979, he was Chief of the Economics Division of the FCC's Common Carrier Bureau.

From 1973 to 1975, he was a member of the staff of the Office of Telecommunications, Department of Commerce. He has also held positions in private industry.

In 1968 and 1969, he worked as a financial analyst at the corporate headquarters of E. I. DuPont de Nemours & Company in the Business Analysis Division. From 1965 to 1968 he worked in the area of manufacturing engineering for Lockheed Georgia Company and Westinghouse Electric Corporation.

Dr. Bolter has delivered numerous papers and written articles and other works in such areas as technological change, regulatory policy, costing, economics, finance and accounting for presentation to an extensive range of industry and consumer groups, professional societies, domestic and foreign governmental and other groups. He has prepared remarks or presented testimony to the Congress, and to the Federal Communications Commission and state regulators. His more recent major studies as a sole or principal author include: International Communications Policy; Depreciation Reform: A Crucial Step in Transforming Telecommunications to a Free Market; and Telecommunications in Transition: The Status of Competition in the Telecommunications Industry.

The author would like to thank the many individuals who contributed their thoughts and insights during the course of this investigation.

Senator GOLDWATER. I have no questions. I have enjoyed listening to your comments. I do not envy you your job of researching this subject all the time. I think it would get kind of dull.

Mr. LONDONER. It is rather challenging, Senator.

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Senator GOLDWATER. I want to thank you for coming to be with us. It has been a real pleasure to have you.

Mr. LONDONER. Thank you for the opportunity.

Senator GOLDWATER. Now, the next panel will be Mr. Andrew Schwartzman, Media Access Project, Mr. Mario Obledo, president of League of Latin American Citizens, Mr. Ralph Jennings, U.S. Catholic Conference, and Madame Diane Asselin, Asselin Productions.

Would you folks please be seated? And I will remind you, as I have the others, that your prepared statements will be printed in the record. If you care to deviate from them and just highlight them, time is running on, and we do have a bill on the floor that will take our attention shortly. So, Mr. Obledo, you are on the right, and I always like to start from the right, so you may go.

STATEMENTS OF ARNOLDO TORRES, NATIONAL EXECUTIVE DIRECTOR, LEAGUE OF UNITED LATIN AMERICAN CITIZENS, WASHINGTON, D.C.; DIANE ASSELIN, ASSELIN PRODUCTIONS, INC., LOS ANGELES, CALIF.; RALPH JENNINGS, U.S. CATHOLIC CONFERENCE, NEW YORK, NEW YORK; AND ANDREW J. SCHWARTZMAN, MEDIA ACCESS PROJECT, WASHINGTON, D.C.

Mr. TORRES. Senator Goldwater, it is indeed a pleasure to come before you. It is the first time that I, on behalf of the League of United Latin American Citizens, have had the opportunity to testify before your subcommittee.

For the record, we indicate our apologies to the subcommittee for Mr. Obledo not being able to join us. My name is Arnold Torres. I am the national executive director for the League of United Latin American Citizens, which is this country's oldest and largest Hispanic organization. We want to thank Senator Pete Wilson of California for his support in insuring us the opportunity to testify before this subcommittee today.

The league is very concerned about the status and the future of the syndication rule which is being debated. Over a year ago, the league became involved in this debate based on contacts made on behalf of the networks to the league. We were clearly told at that time, not only by one network, but by all three eventually over a month's period, that if repeal of the syndication rule was to take place, there would be more resources available for them to provide greater diversity of programing and the creation of programing for Hispanics. That was made very clear in their statements.

Another statement that was made, or contention made, that we should be concerned about pay versus free public television, and that with the limited resources and the tremendous upsurge of pay television, that the Hispanic community, because of our economic situation, would stand to lose a great deal of entertainment that was not being provided by free television.

The first argument which is made to us with regard to diversity was one that we thought was worth taking a gamble on. As a consequence, in October of last year, we supported the repeal of the syndication rule. We made this decision based on the fact that if the contention being made was true, then we would see over a year's period of time the networks actually meeting us halfway,

making some commitments to institutionalize change, and actually bringing about the diversity from funds that they would receive from the repeal of the rule.

A year later, we found that very little progress, if any, was made in our discussions with the networks. We were told that the networks—we were told that there was no quid pro quo, that support for the repeal of the syndication rule would not result in commitments from them to diversify their programing and hire more Hispanics on and off camera.

However, the networks have been very concerned about our involvement in opposing the repeal of the syndication rule. What we found over a year's period of time is that very little progress has been made on behalf of the networks with regard to having Hispanics on and off the camera.

We went so far as to commission two surveys one last year in October and one this year again, in March. The results support our case. We received constructive criticism from the networks. We were told that 1 week of reviewing prime time television was not sufficient, and that the methodology used needed refinement. Well, we wrote a letter to all three of the networks asking them to please do their own audit, and that we very much appreciated the constructive criticism.

We asked for a response in 10 days, and as of yet we have not received any response or any contact from the networks, even though we have been meeting with them since the letter was written. What we have reached in our conclusion is that it really makes very little difference with regard to the diversity on television if in fact the rules are repealed or not.

So, the overture made to Hispanics and others about the quality of programing, et cetera, is in our opinion a very fallacious argument on behalf of the networks. We are very concerned with regard to those contentions, because we do not find them to be under any circumstances accurate. The reason for our concern of the rule is also coupled with the review of the seven, seven, seven rule. Here, many of you know, is the standard that limits ownership by one entity to seven AM stations, seven FM, and seven television stations.

If this rule is to also be repealed by the FCC, Hispanics, minorities, children's programing, and things of this nature will have even less of an opportunity to really reach the viewing public, whether it be pay or free television.

In view of these conclusions and in view of the yellow light, we have concluded that the best thing that we can do is to have a 3-year moratorium on the rule. We also very, very strongly recommend that during this 3-year period, the Congress and the FCC conduct audits of the diversity of the networks and what potentially could be done to have the networks their programing, et cetera.

We believe that if the networks are going to make these contentions, then it should be backed up with some type of empirical data.

In closing, I would like to say that we found in dealing with the studios and the networks that the networks tell us that it is the studios' fault. When we went to the studios, the studios told us that it was the networks' fault. So when you look at that situation, you

do find that the syndication rule is really not the issue with regard to diversity. We conclude that the networks are not that committed, and unless we are going to see some real progress being made, then the best thing for us to do is to step away and make a serious assessment and analysis of the consequences and the possible benefits of actually tinkering with the syndication rule.

I would be more than pleased to answer questions, but I do appreciate very, very much the opportunity to come before this subcommittee and present our views on such an important issue when it comes to Hispanics in the media. Thank you very much.

[The statement follows:]

STATEMENT OF ARNOLDO S. TORRES, NATIONAL EXECUTIVE DIRECTOR, LEAGUE OF UNITED LATIN AMERICAN CITIZENS

Good morning, my name is Arnoldo S. Torres and I am the National Executive Director of the League of United Latin American Citizens (LULAC), the nation's oldest and largest Hispanic organization with 110,000 members in 43 states. We appreciate the opportunity to present our views before the Senate Subcommittee on S. 1707, the Competition in Television Production Act. As you are all well aware, this and similar legislation discussing the FCC's proposed changes of its financial interest and syndication rule has caused a great deal of controversy within the telecommunication industry and between individuals affected by the industry.

LULAC has been concerned with the portrayal of Hispanics in the media and the lack of diversity over the airwaves for some time now. One has only to watch prime time television and see the Hispanic presence is missed.

The Hispanic community's presence in the Americas date back to approximately five centuries. During this time Hispanics have contributed culturally, economically, politically, and militarily to our country's growth. In the southwest and Florida, the cultural influence dominates as evidenced by the food, architecture, and the names of states and cities in this area. In fact, the oldest city in the United States is a Spanish city, St. Augustine in Florida.

With the purchasing power exceeding $50 billion dollars and tax contributions in the hundreds of billions, Hispanics have contributed significantly to the nation's financial growth.

LULAC entered into negotiations with the networks in the hope that in exchange for our support for repeal of the financial interest and syndication rule, they would have more money from repeal to give to Hispanic producers for programming on Hispanics. In October of 1982 LULAC decided to support repeal of the syndication rule to demonstrate our good faith in negotiating with the networks. After a year of negotiating with the networks, we saw no reasonable efforts made institutionally to justify our support of the networks' position.

An audit of the networks new fall television series done by Public Advocates, Inc., a public interest law firm in San Francisco at LULAC's request, revealed that Hispanics are misrepresented on camera. Entitled "Network Brown-Out of Hispanics" the audit revealed:

That only one lead character was Hispanic—Geraldo Rivera of ABC's "20/20;"

That only three of 496 characters with significant speaking roles were Hispanic (½ of one percent);

That only 10 of 8676 characters who spoke one or more lines were Hispanic (one percent);

That two of the three networks (ABC and NBC) showed significant *decreases* in the percentage of Hispanics portrayed (up 30 percent at ABC and 70 percent at NBC) since the last audit in February 1981. CBS showed no change over the last two and one-half years due to its having the worst record both times—only one of its 212 characters in 1981 was Hispanic and only one of its characters was Hispanic in 1983; and,

That none of the Hispanic entertainment figures portrayed a positive image.

As a result of these findings, LULAC reversed its position and is seeking a three year moratorium in repeal of the syndication and financial interest rule.

There have been some network personnel who have suggested that reviewing one week of prime time television is insufficient and that the methodology used needs refinement. We appreciated this postive criticism which resulted in a letter from our National President, Mr. Mario G. Obledo, to the Chairman of ABC, CBS, and

NBC. The letter suggested that a network audit should be conducted. The audit could be retroactive for the period September 26 to the last week in October.

The audit could be independent of the networks, jointly with Hispanic organizations and/or by the networks themselves to identify the number of Hispanic characters broken down by significance of role and the number of Hispanic actors, producers, and writers.

We have yet to receive a response from the networks. Their findings would be interesting. To our knowledge, Hispanics comprise 4.6 percent of the total workforce within the broadcast industry (7,363 out of 159,740) yet only one percent of the workforce is decision-making positions.

Coincide these figures with the fact that Hispanics represent one percent of the VHF, UHF, Cable owned companies, AM and FM radio stations, and it is easy to see that institutional changes in the industry need to be made.

These statistics on Hispanics ownership within the industry are important when diversity is discussed. Diversity does not exist within network programming.

There was a study on March 23, 1983 of the 17 programs that we surveyed by Corpus Christi State University that we requested to do a study:

Of the 17 programs prime time, 9 out of the 263 characters were Hispanic;

Excluding "Hill Street Blues," Hispanics equaled 5 out of 232 characters portrayed;

"Hill Street Blues," accounted for 44.4 percent of the number of Hispanics portrayed on television;

The percentage of Hispanics in major roles was 2.2 percent (2 of 92 "Hill Street Blues" and "9 to 5.")

Four out of nine were minor roles. Two were cooks ("Archie's Place"), one a maid ("Dallas"), and one a gang member ("Hill Street Blues").

In the city of Dallas it is pretty hard not to see a Hispanic in the streets, and in Dallas, I think they are more than just maids, but if you watch the "Dallas" program we are lucky if we are a maid. We are not even ranch hands. They have even negated the stereotype of us being farm workers.

The question of diversity is at the heart of another FCC proposed change is the Multiple Ownership Rule, better known as the 7-7-7 rule. While we may find it irrelevant for this discussion, we argue otherwise.

As you all know, the 7-7-7 rule limits ownership by one entity to seven AM stations, seven FM radio stations and seven television stations. The FCC is considering repeal of this rule because there is sufficient diversity over the airwaves.

How the FCC came to this conclusion is beyond me for clearly repeal of the 7-7-7 rule decreases the opportunity for Hispanics and other minorities to own and operate small radio and television stations.

The networks continue to misrepresent their intentions on behalf of Hispanics. In a recent full-page advertisement that appeared in the Washington Post, a representative of a Hispanic organization is quoted as saying:

"After reviewing a great deal of the pros and cons on this issue, it is our considered opinion that the public interest would best be served if these rules were repealed. We have concluded that the availability of high-quality over-the-air television programming supported by advertising dollars is being eroded by these rules."

In essence, we said the exact same thing. It is very clear that neither side in the syndication-financial interest controversy has accurately represented America. The richness and the diversity of America as embodied by its 53 million Blacks, Hispanics, and Asians, is either ignored or demeaned.

The question presently before you is why this nation's oldest and largest Hispanic membership organization and the American GI Forum, the nation's largest Hispanic veteran's organization, care which side prevails since neither has fully and accurately portrayed minorities?

Our answer is simple. We fear, that a change in the present rules will concentrate even more power in the networks thereby ensuring the continued exclusion of minorities.

Each isolated decision by the FCC hurts Hispanics and other minorities but more importantly the combined effect is catastrophic. The additional revenue the networks garner from repeal of the syndication and financial rule will be used to buy out smaller markets and tighten controls of the airwaves into their own hands.

In the light of the information we have just cited both of these decisions concern us.

One thing is clear, the networks if they wish, could strongly and openly encourage diversity in programming. They have not. And they will not unless the FCC and Congress make it clear that without diversity they will receive no additional power.

And, as must be obvious, if the networks are strong and effective, efforts to encourage diversity, the studios will comply. For example, if CBS urged that "Dallas" show Hispanic and Black politicians and businessmen, the producers would surely comply.

We believe that our request for a three-year moratorium on any changes is a fair compromise that neither unduly rewards the studios nor unfairly punishes the networks.

During this three-year period, we urged Congress and the FCC to monitor the progress and the efforts of the studios and the networks regarding diversity.

Should the networks during this three-year period prove themselves able to ensure diversity, modification of the present rules may be in order. On the other hand, should the studios and independent producers effectively demonstrate their commitment to diversity, it may be that the present rules should be continued beyond the three-year moratorium we have urged.

Before deciding this question, we urge you to secure the data on diversity, or lack thereof, from both parties to this dispute. The networks, although criticizing our data, refuse to submit any of their own.

Therefore, we recommend:

A three year moratorium on rules changes take place;

During that time a comprehensive audit be conducted by Congress, the FCC, the networks and the independent producers to determine the numbers of Hispanic actors and actresses and the number of Hispanic employees and their positions.

Thank you.

Senator Goldwater: Muchisimas gracias, senor.

Mr. TORRES. Muchas gracias.

Senator GOLDWATER. Ms. Asselin?

Ms. ASSELIN. Mr. Chairman and members of the subcommittee, I want to thank you also for the opportunity to be here today. I have testified and lobbied in favor of the retention of the syndication and financial interest rules several times in these last months, wearing the hat of an independent producer of dramatic children's specials for the networks, and as a matter of fact I am here today in the public interest of children on this particular panel, and as the owner of a small production company in Los Angeles which will no doubt be forced out of business if the current rules are repealed—I am the small producer, the small independent producer—and others like me who are referred to often in these hearings.

Though I have those career and business interests in this issue, I also have a deep concern as a parent and as a citizen, if the networks gain even more control over the airwaves through ownership of the programs, from my experience in network dealings. That kind of monopoly would certainly affect the diversity of programs in general, and would specifically affect what is available for children to watch.

The number of hours children spend watching television is well known and well reported, and we all acknowledge that TV has become a primary socializing force in modern society, and that all of our kids are very affected by it. I believe that what is offered to this diverse age group of viewers, really ages 2 through adolescence of 15 or 16, should be as broad as possible in subject matter and in point of view.

Ideally, television would be used to entertain them, to inform, to educate, and to inspire. Since we all have so much at stake in their intelligence and the developing good judgment of these children, it would be sad indeed if all the decisions about what programs are chosen to appeal to this very special group were made only in the light of what brings in the highest advertising dollar.

In fact, the kind of dramatic specials that I produce for ABC and CBS as an independent did not begin or succeed in reaching and affecting so many young people originally because they were profitable. They began because of a Government mandate to the networks to provide some quality programing for the children in the audience. Out of that positive pressure, and that took place some 8 to 10 years ago, out of that positive pressure has come a widely acclaimed group of films produced and owned by many independent producers like myself.

Some of these films have dramatized literature, as in the CBS Library specials and ABC weekend specials, and some have focused on social and personal issues important to teenagers, as with the ABC after school specials and the CBS Playhouse series. The networks have also benefited from attention and awards for this kind of programing.

I would like this committee to be aware of others who care very much about the effect of television viewing on children, who also support retention of the rules and share my views. I feel like I am representing them here today. Action for Children's Television is a nonprofit children's advocacy group working to encourage diversity in children's programing. It represents 20,000 members, including the American Academy of Pediatrics, the NAACP, the national arm of the PTA, the National Association for the Education of Young Children, and several labor unions and labor organizations.

Peggy Charren is the ACT president, and she has gone on record to say that the children in the adolescent market will only be served by diversity of ownership and control which is guaranteed by the current rules.

The retention of the rules is also supported by the National Education Association, the NEA. They filed comments to the FCC stating that it is unrealistic and premature for the FCC to eliminate the current regulations.

I am concerned that commercial standards will be the overriding consideration network decisions about children's programing if deregulation takes place, and let me give you a specific example of where my concern comes from. Lou Shymer is the president of Filmation Enterprises, a company well established in the field of Saturday morning animated shows, and the creator of the "Fat Albert" and the "Cosby Kids" series, which is long running on CBS. "Fat Albert" is a series widely praised by educators and critics for instilling prosocial values while entertaining its audience.

On October 11, Mr. Shymer appeared on Ted Koppel's "ABC Nightline" program to voice his growing concern that the networks no longer want to buy programs such as "Fat Albert" from him, and specifically quoted a network executive as telling him that if he presented another prosocial show, it would automatically be rejected.

Networks have woed many minority groups to their side on this current controversy, just as Mr. Torres has confirmed from his own experience, by promising more leverage and access to air time if the rules change. However, if we can predict the future behavior by stories like Lou Shymer's from the present, it is hard to believe that programing would become more diverse for children if the networks are given even more control.

I worry about the kind of programing that I do being able to continue to exist at all without Government pressure.

The number of independent producers who develop and sell programing ideas as well as the number of independent stations has increased with the current rules in place. I believe that this variety of people working individually on program possibilities results in greater diversity and quality programing for viewers, and that that is in the public interest, in the interest of quality children's programing.

Conversely, I cannot believe that given greater control through ownership of programing, three dominant companies would possibly be in the public's interest in diversity.

I know that the red light is on, but I would like to say something directly to Senator Packwood that came up in the first panel on the guild, which in my view just needs a little clarification, and that is, you asked about the timing of the hearings, and when should this decision be made, and if we have had enough time to testify.

I personally think we have, but that is not the issue. That aside, the time for more testimony is not the reason that we who are supporting prudent deregulation are asking for the moratorium on the change. The moratorium is necessary because the marketplace is changing, but ever so slightly, and nowhere near to the degree that it would mandate a change in the FCC policy at this time.

I was very interested in Senator Goldwater's statistics, particularly about the decline of 22 percent in the HBO ratings. This is just an indication that perhaps these hearings will be in order, and perhaps even this change will be in order at some point in time. We who sell to the networks and also have tried to sell to cable just feel we are not there yet.

Thank you for your interest in the issue.

Senator GOLDWATER. That concludes your testimony?

You know, this Ms. kind of messes me up. I do not know whether to say Mrs. or Miss.

Ms. ASSELIN. Ms. M-s.

Senator GOLDWATER. Do you just say Ms?

Ms. ASSELIN. I will respond to anything. Hey, you.

Senator GOLDWATER. I am not going to try that at home.

Mr. Jennings?

Mr. JENNINGS. Thank you.

My name is Ralph M. Jennings. I am a consultant with the Department of Communication of the U.S. Catholic Conference. The USCC believes that the FCC proceeding concerning repeal of the financial interest and syndication rule has tended to focus too narrowly upon the economics of the television industry, and in particular, the networks.

In deregulating broadcasting, the present FCC appears to be giving insufficient weight to the needs and interests of the listeners and viewers who depend upon commercial television for access to ideas and information. The USCC urges that Congress and the FCC give greater consideration to what the Supreme Court has called "the public right to receive suitable access to social, political, esthetic, moral, and other ideas and experiences. * * *"

The USCC supports S. 1707. It believes that the retention of the present syndication and financial interest rules, along with the prime time access rule, for the next 5 years would be in the best interest of the viewing public. The rules have helped to stimulate vigorous, independent production and syndication businesses which have increased the diversity of television programing that is available to local television stations.

In turn, the availability of this programing has allowed independent television stations to become more competitive with network-affiliated stations and to add to the mix of programing that is available in local markets.

When the FCC adopted its sixth report and order in 1951, it ordained that we would be limited to just three television networks. For all practical purposes, this meant that the American people would have most of their television programs strained through three funnels. Commissioner Jones decried the ruling, indicating that the Commission had created an "artificial scarcity."

Having established a system with such limited access, it was incumbent upon the Government to maximize diversity within its confines. The syndication, financial interest, and prime time access rules are part of a package designed to do just that. They help to check network control over off-network syndicated programing, and to allow independent producers and syndicators to gain a place in commercial television. They have also supplied independent television stations with programing which has enabled them to become a competitive force in broadcasting.

Now, it is argued, times have changed. The FCC asserts that competition from new video delivery systems makes it necessary to free the networks from rules which reduce their viability in the marketplace. Yet, network television, which reaches 83 million households, remains the only visual medium that has instant access to virtually every home in America. Cable, which reaches no more than 26 million homes, is its nearest rival. None of the other new systems, such as STV, MDS, SMATV, video cassettes or video discs, penetrates any more than 2 million homes. Some, like DBS, do not yet exist.

The networks claim that they can no longer compete with services like pay cable for the kind of programing that the public has come to expect from so-called free television. The mainstay of network television is the prime time entertainment series, such as situation comedies, police dramas, and westerns.

Yet the programs most often mentioned by the networks are sporting events and feature films. These presentations have always exhausted box office opportunities before appearing on commercial television. Sporting events are routinely "blacked out" to protect the gate.

In any event, relaxation of the rules does not appear to directly address the problem posed by the networks. Moreover, there is little evidence that cablecasters will steal entertainment program series from the networks.

In short, it appears that for the foreseeable future the networks will continue to dominate the television marketplace and will have no peers in terms of advertiser-supported programing. To the public, the FCC, and the Congress, the networks insist that their

audiences are diminishing, and that they are in great danger of losing out in the new video marketplace. To their affiliates and sponsors, the networks are painting a rosy picture of future prosperity.

At the same time, the networks are scrambling to gain a foothold in the very businesses they claim will ruin them. For example, ABC, CBS, and NBC have invested in program services for cable. ABC is planning a nocturnal subscription television service over its network facilities and affiliated stations, and RCA, parent of NBC, is a leader in video tapes and video discs.

Little, if any, evidence has been presented in the FCC proceeding to demonstrate the need for immediate action. The competition among affiliates and independent stations, and between broadcasting and the new video services promises to give some segments of the public increased viewing possibilities. At the same time, there are numerous small producers and syndicators whose businesses owe their very existence to the rule, and whose continued viability in the television marketplace depends upon their continuation.

Under present circumstances, it seems prudent to maintain the rules as they are now written. At the end of the 5-year moratorium provided by S. 1707, there may be a clearer indication of the need for change.

[The statement follows:]

STATEMENT OF DR. RALPH M. JENNINGS, CONSULTANT TO THE DEPARTMENT OF COMMUNICATION OF THE UNITED STATES CATHOLIC CONFERENCE

My name is Ralph M. Jennings. I am a consultant to the Department of Communication of the United States Catholic Conference.

The United States Catholic Conference ("USCC") is a nonprofit membership corporation composed of all the Catholic Bishops in the United States. The programs of the USCC include the areas of education, social welfare, health and hospitals, family life, immigrant aid, poverty assistance, youth activities, and communications, with emphasis on the preservation of religious liberty. When deemed appropriate and permitted by court rules or practices, the USCC offers its views in litigation touching important socio-moral and other issues pertinent to its areas of activity, particularly as they may affect the Catholic Church or its people in the United States.

The USCC has long been concerned with the quality and character of the broadcast services available to the American people. It has been a frequent participant in Congressional hearings and proceedings before the Federal Communications Commission to express its viewpoints on proposed legislation and rules that affect telecommunications services. The USCC is especially concerned that television provide the public with a broad range of news, information and entertainment programming. Our national telecommunications policies should maximize the diversity of voices that reach the air.

The USCC believes that the FCC proceeding, BC Docket No. 82-345, concerning repeal of the Syndication Rule (47 CFR Section 73.658(i); 23 F.C.C. 2d 382) and Financial Interest Rule (47 CFR Section 73.658(ii); 23 F.C.C. 2d 382), has tended to focus too narrowly upon the economics of the television industry, and in particular the networks. In deregulating broadcasting, the present FCC appears to be giving insufficient weight to the needs and interests of the listeners and viewers who depend upon commercial television for access to ideas and information. The USCC urges that Congress and the FCC give greater consideration to what the Supreme Court has called "the public right to receive suitable access to social, political, esthetic, moral and other ideas and experiences. . . ." *Red Lion Broadcasting Corp.* v. *FCC*, 395 U.S. 367, 390 (1969).

The USCC supports S. 1707. It believes that retention of the present Syndication and Financial Interest Rules, along with the Prime Time Access Rule (47 CFR Section 73.658(k); 23 F.C.C. 2d 382), for the next five years would be in the best interest of the viewing public. The rules have helped stimulate vigorous, independent production and syndication businesses which have increased the diversity of television

programming that is available to local television stations. In turn, the availability of this programming has allowed independent television stations to become more competitive with network affiliated stations and to add to the mix of programming that is available in local markets.

Access to broadcasting is initially restricted by the physical limitations of the electromagnetic spectrum. It is also controlled by the few who enjoy a license to broadcast. Provision of a diversity of expression which reflects our society—first over radio and then in television—has been a perennial concern both to regulators and the public.

The advent of chain broadcasting brought with it increased fears as the networks sought to control the choicest time on the nation's most influential stations. Over the years, this concern has led to numerous Congressional hearings and FCC proceedings seeking ways in which to limit network power. The FCC first took measures to curb network influence in the 1941 Chain Broadcasting proceeding. In it the FCC restored to network radio affiliates a measure of control over their time. This action was later sustained by the Supreme Court. *National Broadcasting Company v. United States,* 319 U.S. 190, 213 (1943).

When the FCC adopted its "Sixth Report and Order" in 1951, 41 FCC 148 (1951), it ordained that we would be limited to just three television networks. For all practical purposes, this meant that the American people would have most of their television programs strained through three funnels. Commissioner Jones decried the ruling, indicating that the Commission had created an "artificial scarcity." Having established a system with such limited access, it was incumbent upon the government to maximize diversity within its confines.

The Syndication, Financial Interest and Prime Time Access Rules are part of a package designed to do just that. They help to check network control over off-network syndicated programming and to allow independent producers and syndicators to gain a place in commercial television. Even though the networks have continued to increase the amount of station time they control, the rules have held open one-half hour daily of prime time to non-network programming and allowed more programming from independent sources to appear on affiliated and network owned operated stations. They have also supplied independent television stations with programming which has enabled them to become a competitve force in broadcasting.

Prior to 1971, first run, syndicated television production was an insignificant business. Over the past decade its revenues have grown to more than $275 million. Between 1974 and 1982, there has also been a modest growth in the number of syndicators who program to 10 or more stations (exclusive of children's and devotional programs), a jump from 66 to 89. (Report on Syndicated Television Programs—February-March 1974, February 1982 (Northbrook, Illinois: A.C. Neilson Co., 1974, 1982.)

Now, it is argued, times have changed. The FCC asserts that competition from new video delivery systems makes it necessary to free the networks from rules which reduce their viability in the marketplace. Yet, network television, which covers 83 million households, remains the only visual medium that has instant access to virtually every home in America. Cable, which reaches no more than 26 million homes, is its nearest rival. None of the other new systems, such as STV, MDS, SMATV, videocassettes and videodiscs penetrates any more than 2 million homes. Some, like DBS, do not yet exist.

The networks claim that they can no longer compete with services like pay cable for the kind of programming that the public has come to expect from so-called "free television." The mainstay of network television is the prime time entertainment series, such as situation comedies, police dramas and westerns. Yet, the programs most often mentioned by the networks are sporting events and feature movies. These presentations have always exhausted box office opportunities before appearing on commercial television. Sporting events are routinely "blacked out" to protect the gate. In any event, relaxation of the rules does not appear to directly address the problem posed by the networks.

On the one hand, it does not appear that the networks are interested in serving the minority tastes by providing the specialized entertainment fare that makes up many of cable's offerings. On the other hand, there is little evidence that cablecasters will steal entertainment program series from the networks. In short, it appears that, for the forseeable future, the networks will continue to dominate the television marketplace and will have no peers in terms of advertiser-supported programming.

To the public, the FCC and the Congress, the networks insist that their audiences are diminishing and that they are in grave danger of losing out in the new video marketplace. To their affiliates and sponsors the networks are painting a rosy picture of prosperity for years to come. At the same time, the networks are scrambling to gain a foothold in the very businesses that they claim will ruin them. For exam-

ple, ABC, CBS and NBC have invested in program services for cable, ABC is planning a nocturnal subscription television service over its network facilities and affiliated stations and RCA, parent of NBC, is a leader in video tapes and video discs.

Little, if any, evidence has been presented in the FCC proceeding to demonstrate a need for immediate action. The competition among affiliated and independent stations and between broadcasting and the new video services promises to give segments of the public increased viewing possibilities. At the same time, there are numerous small producers and syndicators whose businesses owe their very existence to the rules and whose continued viability in the television marketplace depends upon their continuation. Under present circumstances it seems prudent to maintain the rules as they are now written. At the end of the five year moratorium provided by S. 1707 there may be a clearer indication of the need for change.

Senator GOLDWATER. Thank you very much, Mr. Jennings. I believe this is exactly on point.

And now, Mr. Schwartzman.

Mr. SCHWARTZMAN. Thank you, Mr. Chairman.

Let me begin by minimizing the relative importance of the issue before you today. This subcommittee and the FCC have numerous issues before them which will literally shape the ways Americans will communicate with each other, educate our children, and inform ourselves on how to exercise voting privileges.

The FCC's ill-considered attempt to repeal its network financial interest and syndication rules seems by comparison to justify much less attention than it has received. It is, some cynics have suggested, simply a matter which involves two very large and powerful interest groups—the networks and the movie studios—who also happen to have the resources to turn a backroom brawl into front page news.

Why, then, have groups such as mine devoted so much attention to the issue? The answer is twofold. First, the rules are important in and of themselves. Second, the widespread attention that the proposed repeal has received, regardless of the reason, provides an important opportunity to emphasize that whatever business and commercial interests are involved, it is the public which is most greatly affected by these decisions, and it is the public whose interests should be considered when these decisions are made.

In other words, I am here today to remind you that the interest of the public determines what is in the public interest. In the case of the financial interest and syndication rules, the public interest lies in leaving these rules in effect.

There are many more important things for the FCC and Congress to do than to rehash the financial interest and syndication issue. But, while I regret that the networks have started this debate at all, it does give me a chance to emphasize that well conceived economic regulation can promote competition and diversity and further the goals of the free enterprise system.

The financial interest and syndication rules are content-neutral, self-enforcing, and minimally intrusive. They have demonstrably contributed to the climate of competition, promoting the open entry into the program field. While they have not fully realized every hope, they have been wholly beneficial.

In particular, they have been a major factor in the evolution of the independent television stations into a major factor into the marketplace, to the clear benefit of the demographically less attractive groups, such as the elderly, the young, the minorities, and rural audiences, whose needs have been more fully met as a result.

So, too, have they enhanced the freedom needed by the creative community. I do not mean to suggest that the independent stations have an unblemished record of public service, but their willingness to serve audiences ignored by networks and their affiliates have been a big plus. The independent stations have parlayed the revenues from off-network programs into new program forms which have now begun to provide new and needed sources of original program competition.

So, too, I do not mean to suggest that the movie studios have always distinguished themselves, particularly in terms of meeting the needs of America's racial and ethnic minority audiences. And, without the nudge of the FCC equal employment regulations, the movie studios have fallen far behind many broadcasters in their affirmative action programs. But I do believe that the movie studios' mere presence in the program market has promoted diversity and innovation, especially in view of the networks' historic timidity in approaching new or innovative programing concepts.

Simply stated, independent producers have a much broader range of financing opportunities under the current system with studio participation. History proves that if the rules are modified and the networks get back in, diversity will suffer.

These rules have worked. Success is hardly a reason for repealing them. To the contrary, they are as much needed today as ever. Network dominance of the program market has diminished, but has hardly ended. To lift the rules at this time is to invite the networks to extend their dominance into the new technologies, where they have thus far staked out a substantial future role for themselves without apparent difficulty.

The networks' unique advantages make them a formidable force. At least in the short run, STV and pay cable channels are diminishing in number, giving even more reason to doubt the networks' predictions that somehow their new competitors will soon be able to outspend them. And there is no reason whatsoever to believe the networks' demagogic claims that the future of so-called free TV is in the balance, especially when the networks are swiftly positioning themselves as leaders in the development of pay television.

Mr. Chairman, unlike many of the problems you must consider, this is one with a clearcut answer. The financial interest and syndication rules are a success. If the FCC will not leave them in place, you should enact S. 1707, to achieve the same result.

Finally, I would like to note that I have brought with me a dozen or so written statements submitted to the FCC and to various Members of Congress from public interest, civil rights, minority, labor, and other groups in support of retention of the rules, and I would like to submit them for inclusion in the record.

[The statement follows:]

STATEMENT OF ANDREW JAY SCHWARTZMAN

Mr. Chairman, thank you for inviting me to testify today. While my organization, the Media Access Project,[1] has represented several religious organizations and other

[1] Media Access Project is a non-profit public interest law firm which seeks to promote the public's First Amendment right to receive access to the broadest possible range of information and ideas. Over the last 11 years, Media Access Project has represented consumer, civil rights,

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public interest groups in comments filed with the FCC on the financial interest and syndication rules, I am appearing today as an individual.

Let me begin by minimizing the relative importance of the issue before you today. This subcommittee and the FCC have numerous issues before them which will, literally, reshape the ways in which we Americans will communicate with each other, educate our children, and inform ourselves on how to exercise voting privileges. The FCC's ill-considered attempt to repeal its network financial interest and syndication rules seems, by comparison, to justify much less attention than it has received. It is, some cynics have suggested, simply a matter which involves two very large and powerful interest groups—the networks and the movie studios—who happen to have the resources to turn a backroom brawl into front page news.

Why, then, have groups such as mine devoted so much attention to this issue? The answer is two-fold. First, the rules are important, in and of themselves. Second, the widespread attention that their proposed repeal has received—regardless of the reason—provides an important opportunity to emphasize that, whatever business and commercial interests are involved, it is the public which is most greatly affected by these decisions, and it is the public whose interests should be considered when these decisions are made.

In other words, I am here today to remind you that the interests of the public determine what is in the public interest. And in the case of the financial interest and syndication rules, the public's interest lies leaving them in effect.

There are many more important things for the FCC and Congress to do than rehash the financial and syndication issue. But, while I regret that the networks have started this debate at all, it does give me a chance to emphasize that well conceived economic regulation can promote competition and diversity, and further the goals of a free enterprise system. The financial interest and syndication rules are content-neutral, self-enforcing and minimally intrusive. They have demonstrably contributed to the climate of competition, promoting open entry into the program field. While they have not fully realized every hope, they have been wholly beneficial. In particular, they have been a major factor in the evolution of the independent television stations into a major factor in the marketplace, to the clear benefit of demographically less attractive groups, such as the elderly, the young, minorities and rural audiences, whose needs have been more fully met as a result. So, too, have they enhanced the freedom needed by the creative community.

I don't mean to suggest that the independent stations have an unblemished record of public service. But their willingness to serve audiences ignored by networks and their affiliates have been a big plus. The independent stations have parlayed the revenues from off network programs into new program forms which have begun to provide new and needed sources of original program competition.

So, too, I don't mean to suggest that the movie studios—the networks' other major antagonist in this particular battle—have always distinguished themselves, particularly in terms of meeting the needs of America's racial and ethnic minority audiences. And, without the nudge of FCC equal employment regulations, the movie studios have fallen far behind many broadcasters in their affirmative action programs. But I do believe that the movie studios' mere presence in the program market has promoted diversity and innovation, especially in view of the networks' historic timidity in approaching new or innovative programming concepts. Simply stated, independent producers have a much broader range of financing opportunities under the current system, with studio participation. History proves that if the networks get back in, diversity will suffer.

These rules have worked. Success is hardly a reason for repealing them. To the contrary, they are as much needed today as ever. Network dominance of the program market has diminished, but has hardly ended. To lift the rules at this time is to invite the networks to extend their dominance into the new technologies where they have thus far staked out a substantial future role for themselves without apparent difficulty. The networks' unique advantages make them a formidable force. At least in the short run, STV and pay cable channels are diminishing in number, giving even more reason to doubt the networks' predictions that somehow their new competitors will soon be able to outspend them. And there is no reason whatsoever to believe the networks' demagogic claims that the future of so-called "free" TV is in the balance, especially when the networks are swiftly positioning themselves as leaders in the development of pay television.

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media reform and other groups before the FCC and the Courts on First Amendment and other access issues. I wish to thank David Furth, a 1983 graduate of Stanford Law School, for his assistance in preparing these remarks.

Mr. Chairman, unlike many of the problems you must consider, this is one with a clear cut answer. The financial interest and syndication rules are a success. If the FCC won't leave them in place, you should enact S. 1707 to achieve the same result.

I. FACTUAL AND THEORETICAL BASIS FOR THE RULES

Any discussion of how the financial interest and syndication rules have worked during the past decade requires a careful assessment of what they were intended to do. Critics of the rules have claimed they were "misguided" from the start. But such arguments are based on a subtly slanted view of both the problems which gave rise to the rules as well as the intent of the rules themselves.

A. The Commission's 1970 factual findings were conclusive: The FCC adopted the financial interest and syndication rules after over a decade of inquiry into the networks' role in programming and syndication. In its initial Notice of Proposed Rulemaking [2] and its eventual Report and Order,[3] the Commission described in great detail the evolution and scope of network power. It relied upon data supplied by the networks themselves, as well as by other sources, to document the harmful effects of this power. The evidence was overwhelming and conclusive:

(1) With the decline in advertiser-licensed programming on the networks, program producers were compelled to bargain directly with the netowrks to get their programs on the air.[4]

(2) Networks used their monopoly powers in the bargaining process to extract valuable rights from producers, and gave systematic preference to those programs for which they had obtained those rights.[5]

(3) This not only prevented producers from recouping full costs of production, but also allowed the networks to exercise extraordinary predatory power in the subsequent syndication market at the expense of their major competitors, the independent television stations.[6]

The Commission's conclusions were strongly stated, well grounded and decisively adopted. The action withstood comprehensive judicial review.[7] It was further buttressed by the Justice Department's similar assessment of the evidence, which led to lawsuits against the three networks and consent decrees forbidding anticompetitive practices.[8]

Despite this history, at the behest of the three networks, the FCC has revisited the matter in its pending rulemaking. The networks now argue that the Commission was misguided in its perception of the television industry, and that they did not wield any pernicious power over programming and syndication prior to adoption of the rules.

This is an exercise in historical and regulatory revisionism. It is both misleading and inappropriate. The FCC's attempt to second-guess its own factual findings, made twelve years ago, flies in the face of an overwhelming record. It requires the Commission to overthrow carefully considered precedents for the sake of theories which are, at best, murky and sometimes suspect.

In fact, a careful review of the historical record shows that each of the reasons which the FCC has advanced to justify its reexamination of pre-rules environment were directly addressed by the Commission more than twelve years ago. A number of these claims share an important flaw—they ignore that the rules were designed to stop incipient problems before they got worse. For example, the networks have argued that they did not "dominate" the syndication market before the rules, noting that there were many programs in which they did not acquire full syndication rights.[9] This raises a false issue; in adopting the rules, the Commission had

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[2] Competition and Responsibility in Network Television Broadcasting, 30 Fed. Reg. 4065 (March 27, 1965).

[3] Competition and Responsibility in Network Television Broadcasting, 23 FCC 2d 382 (1970), modified on reconsideration, 25 FCC 2d 318 (1970).

[4] 23 FCC 2d at 387. See also, 30 Fed. Reg. at 4067-4069.

[5] 23 FCC 2d at 389, 393.

[6] *Id.* at 392-394.

[7] *Mt. Mansfield Television, Inc.* v. *FCC*, 422 F. 2d 470 (2d Cir. 1971).

[8] *United States* v. *National Broadcasting Co.*, 449 F. Supp. 1127 (C.D. Cal. 1978), *aff'd mem.*, No. 77-3381 (9th Cir. April 12, 1978), *cert. denied sub nom, CBS, Inc.* v. *U.S. District Court for Central District of Calif.* 48 U.S.L.W. 3186 (1979); *United States* v. *CBS, Inc.* Civ. No. 74-3599-RJK (C.D. Cal. July 31, 1980), reprinted in 45 Fed. Reg. 34,463, 34,466 (1980); *United States* v. *American Broadcasting Companies, Inc.*, Civ. No. 74-3600 RJK (C.D. Csl.) reprinted in 45 Fed. Reg. 58441 (1980).

[9] See, Network Syndication—Financial Interest Rules, CBS ex parte presentation to the Commission, June 1982.

never asserted that such total domination had as yet occurred. Rather, it had found the situation to be extremely "unhealthy", and was acting to forestall such events. The Commission found that the networks "accepted virtually no entertainment program . . . in which they did not have financial interests in syndication and other subsequent use," even if they did not obtain the rights in full.[10] And, even more disturbing the Commission found that the situation was deteriorating. In other words, action was needed because network involvement in syndication was increasing rapidly and apparently without limits.

In context, then, the adoption of the financial interest and syndication rules was an exercise in preventive medicine, relying on the soundest of anti-competitive conditions from getting out of hand. In the 1960's syndication was still a relatively small part of the program industry, but the Commission was well aware that the growing market would make future syndication rights even more valuable to the networks. If syndication were to become more profitable, nothing then on the books could stop the networks from taking as big a share as they desired.[11] Wisely, the Commission did not await catastrophe before taking action.

Similarly, the FCC's Network Inquiry Special Staff ("Special Staff") in their 1980 Report, heavily relied upon by the FCC in its proposed repeal, argues that the networks did not "extort" program rights and interests from the producers, but legitimately paid for them by supplying more up-front financing and reducing producer risks.[12] Quid pro quo arrangements of a sort did exist,[13] but the Commission found that, in practice, producers, got very little in exchange for what they gave up. While, in theory, the networks had the incentive to pay more "up front," in practice, producers still could not recoup their costs from network exhibition alone.[14] Even more damning, the Commission found "no necessary relation between networks providing developmental financing and their acquisition of syndication . . . and/or profit-sharing rights." [15] What the networks today characterize as "risk sharing, " did not happen even before the current prohibitions were adopted. Instead, the networks took more of the profits without meaningfully reducing the producers' risk.

B. The rules are modest in scope and not overly intrusive: The evidence is overwhelming that, at the time of adoption of the financial interest and syndication rules, network power was a genuine problem. Some critics, including the FCC's Special Staff have argued that even if network dominance were present, the rules could not be, and have not been, effective in altering this phenomenon. The rules remove several issues from the bargaining table, the Staff asserts, but they do not affect the fundamental bargaining power of the networks. Hence, it is argued, the rules should be repealed.

It is certainly true that the networks have an inherent advantage as buyers of programs because of their historically unique access to virtually the entire universe of television viewers. This, of course, is the result of regulatory decisions made thirty years ago.[16] For better of worse, the rules (and the Justice Department's consent decree) do not tamper with the structure of the networks themselves.

However, it is a mistake to advocate that the rules should be repealed because they cannot achieve miracles. The fact is that they were never intended to stimulate such radical change. The argument is a tautology: it asserts an "objective" which the rules were not expected to achieve, and then faults them for failure.

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[10] 23 FCC 2d at 394, 392.

[11] That the Commission's main concern was about the future was evident in 1965: "[I]t . . . appears that the potential expansion of both domestic and foreign markets for American television programs is great. . . . Unless more competitive opportunity is provided for independent television program producers, it seems inevitable that network corporations will expand their control of these markets." 30 Fed. Reg. at 4070.

In 1970, the Commission again noted: "While they do not constitute a principal part of overall revenues, revenues accruing to networks from syndication activities are substantial and are increasing." 23 FCC 2d at 392.

[12] Staff Report at 253, 474-475.

[13] 30 Fed. Reg. at 4068.

[14] 23 FCC 2d at 398. The Special Staff argues that no producer would deal with the networks under terms which were not at least minimally adequate. Staff Report at 265. However, the issue is not whether producers can somehow survive on the network's terms, but whether producers will be able to generate more quality and diversity in programming if they cannot retain rights in their programs. As the Commission stated: "The fact that over the years the producers have perforce adjusted their methods of doing business and have learned to live with this situation in no way changes the essentially oligopolistic nature of the situation."

[15] 23 FCC 2d at 388.

[16] See Fowler and Brenner, A Marketplace Approach to Broadcast Regulation, 60 Texas L. Rev. 207, 223-224 (1982).

To be sure, economic regulations rarely work exactly as intended, and the financial interest and syndication rules are not an exception. But they have been effective, and cannot be dismissed as a failure.

The Commission adopted the financial interest and syndication rules as part of a package, which also included the prime time access rule ("PTAR"). The Commission considered all three rules to be essential to the accomplishment of its objectives. Their simultaneous adoption, the Commission hoped, would lead to a more vigorous and independent program supply industry, able to provide diverse and creative programs both on the networks and in first-run syndication. Network control of its own programming would be reduced, and competitive non-network alternatives would develop as well.[17] In hindsight, some of these goals may seem far-fetched. For example, speculation that the rules might lead to creation of a full-time fourth network now seems outlandish.[18] But the Commission was not promising nirvana. It defined its actions as "modest"[19] and it carefully noted that the three rules were not intended to tamper with the basic function of networks as programmers.[20]

In perspective, then, the rules are quite successful. The Commission did not attempt massive interference in the marketplace. Instead, it had adopted a modest, self-enforcing, structural approach, to redirect marketplace forces without trying to transform them. Indeed, the financial interest and syndication rules are the archetype of efficient, self-enforcing regulation which has been smoothly integrated into the marketplace. Like PTAR, they are structural, content neutral regulations put into place to restrict network power in several discrete areas. Far from being "misguided", they are well-suited to achieve this in ways that have been persistently overlooked by critics of the rules.

C. The rules are preventative and have important non-economic objectives: First, the rules have a preventive element. While recent criticism has focused on whether the rules could stimulate positive change in theory or reality, this essential objective has been ignored. Before the rules were adopted, the networks were taking an increasing chunk of the syndication market, were tightening their hold over affiliates, and were increasingly oppressive in their dealings with producers. The first goal of the rules was to stop this pattern from progressing further.

Second, and more important, the rules were intended to achieve goals which do not translate into purely economic terms. Entirely apart from promoting of economic competition in the supply market, the Commission had another critically important objective—the elimination of certain conflicts of interest in the way the networks were able to influence programming. Before the rules, the sorry truth is that the networks could (and did) select programs on the basis of financial interests obtained, rather than on the basis of the public's interest in diverse programming. And, by virtue of their role as syndicators, the networks were able to act as suppliers for their competitors, thus giving them influence in deciding the content of non-network programming.

The Communications Act gives the FCC a mandate to address non-economic power. Broadcast licensees have a unique, governmentally-conferred power to shape public opinion. The financial interest and syndication rules limit the networks' ability to interfere with creative competition among program producers by promoting the overall diversity of television programming. Therefore, the Commission properly eliminated these built-in conflicts.[21] Once again, the intent of the rules is limited: the Commission did not tamper with the networks' prerogative to select their own programming and make content-based decisions about it.[22] But even a limited rule

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[17] 23 FCC 2d at 398.

[18] 30 Fed. Reg. at 4071. However, there was at least one serious attempt to create a fourth broadcast network in the 1970's by Paramount and Hughes Television. The attempt was considered feasible in large part because the rules were in place. And the recent trend towards "occasional" networks is undoubtedly reliant on the rules' impact.

[19] 23 FCC 2d at 395.

[20] 30 Fed. Reg. at 4071.

[21] "[T]he presence of the networks as domestic syndicators is inherently undesirable. They are in the position of selling programs to independent stations in competition with their . . . affiliated stations, and they compete against independent syndicators in the affiliated-station market where they have a permanent advantage. . . ." 23 FCC 2d at 394 (emphasis added). Even if the networks do not dominate the syndication market, their very involvement inevitably affects the available supply of programs which stations can select as non-network alternatives. Not only can the networks use their position to affect competition, but they also have a potential role in deciding the content and diversity of all over-the-air programming, not just original network programming. The Commission felt these were decisions best left to others, free from network influence.

[22] 30 Fed. Reg. at 4071.

could circumscribe still greater creative interference by the networks, and give diversity in programming a fighting chance.

This aspect of the rules must be stressed because so much theoretical criticism of the rules has been based exclusively on free market theories and currently fashionable considerations of economic efficiency. Opponents have argued that the rules were economically unnecessary because supply and distribution of the "product"—television programs already met conventional standards of market competition and efficiency. Aside from the merits of this argument, it completely overlooks the Commisison's other, larger concerns in adopting the rules.

The Commission did not enter the program arena merely to promote economic competition for its own sake, but to protect the public's right to receive diverse and competing ideas in its television programming. To do so, it was necessary not only to regulate the networks' economic power, but to insulate creative competition from the possible effects of that power. If the Commission were dealing with soybeans or silicon chips, such considerations would be irrelevant, and the conflict of interest rationale would make little sense. But the Commission is responsible for protecting the marketplace of ideas, in which diversity and competition are ends in themselves, not just the means to a more efficient system of distributing a "product." The public interest in receiving competing ideas is not necessarily served by the purchase of programs from the lowest bidder in a market which responds only to economic forces. Other values must be protected, both in the promotion of competition among potential suppliers of programs, and in the process by which programs are selected.

II. IMPACT OF THE RULES

The question of whether the financial interest and syndication rules have worked is strenuously debated. While I do not contend that they have been an unqualified success, I do feel certain that the American public is much better off as a result of their operation.

A. The rules have contributed to a changed marketplace: There should be little disagreement that the television industry has changed considerably, and that some of these changes are directly attributable to the rules.

In a strictly mechanical sense, they have undoubtedly "worked"—that is, the networks have obeyed them. As a result, the networks are no longer involved in syndication or foreign distribution of programs. The "vacuum" left by the networks has allowed producers, syndicators, and competing stations to benefit from the distribution of successful network programs in the foreign and domestic syndication markets. In particular, the independent television stations have increased in number and competitiveness, especially in cities where network owned stations have been dominant, further improving the market for both new and off-network syndication.

Obviously, other factors have also contributed to the changed environment. For one, the PTAR has expanded first run syndication, thereby giving independent stations new alternations in competing with networks. Independent stations have also benefitted from advances in technology, the growth of overall audiences, and the consequent increase in advertiser acceptance.

Still, the rules have contributed significantly to the improved marketplace. They have made off-network programming more freely available, particularly to independent stations. The networks can no longer determine when to release syndicated programs, channel them to affiliates, or control the time and frequency of broadcast. Greater competition has in turn contributed to the expanded value of the syndication market, thereby magnifying the impact of the rules.

But the larger and more pertinent question is whether these developments have furthered the Commission's *higher* objectives. The rules were not adopted merely to reallocate profits for the sake of private interests, but to protect and generate diverse sources of programming in the public interest. The Commission intended reallocation as a means to certain ends, and it is on the accomplishment of those ends that the rules must be judged.

Not surprisingly, opponents contend that none of the Commission's higher objectives have been achieved, and in particular, that the rules have not improved program diversity or competition in the supply market. In the wake of the rules, a great deal of syndicated programming (outside the prime time access period) has continued to be off-network reruns, with less new development or first-run syndication than the Commission had hoped. In the network programming market, the networks claim producers have been harmed by the rules. Because the networks no longer offer a "premium" for syndication and subsidiary rights, it is asserted that smaller producers have been squeezed out of the industry for lack of adequate financing. The major beneficiaries, argue the networks, have been the large Holly-

wood studios, who have grabbed a greater share of the market because only they have the wherewithal to sustain the enormous risks of production.[23]

These arguments distort both the intended and the actual impact of the rules. In the first instance, they overlook the rules' preventive function, discussed previously. It is misleading to confine the issue to how the rules have changed the program industry. The other half of the issue is what would have happened without the rules in place. There is ample evidence that the competitive situation would have worsened substantially.

Certainly there was nothing to prevent the networks from engulfing the competition in the syndication industry. Syndicators in business before the rules went into effect remain adamant about the threat which the networks posed. Some competitors went out of business, and others faced a very bleak future. The networks could take as much as they wanted, and they had increasing incentive to take more and more. Similarly, producers who dealt with the networks before the rules lacked the leverage to protect their syndication rights, even as these rights were becoming more valuable and attractive to the networks. Of course, as the FCC Staff Report suggests, producers could always "threaten" to go out of business rather than accept network terms.[24] Unfortunately, this is the sort of "leverage" that operates more effectively in economists' classrooms than in the actual marketplace.

Speculation about "what would have happened" has its risks, but the pattern of the network behavior before the rules were adopted could not be clearer. With syndication becoming more valuable and competition from independent stations increasing, it would be naive to assume that the networks would not have tightened their grip on the production and syndication market—no one had the power to stop them. The rules eliminated this risk entirely. Simply by protecting these markets from further depredation, they "worked" to preserve competition and alternatives to the networks.

Beyond this, though, the rules have generated substantial positive changes in television programming. Not only have they improved economic diversity and competition in the program industry, they have improved the creative climate in which producers operate. Both indirectly, by aiding independent syndicators and stations, and directly, by aiding producers themselves, the rules have moved the program production industry in the direction intended by the Commission. The networks remain strong, of course, but they no longer threaten the public with an economic and creative stranglehold over television.

B. Today's independent syndication market is vigorous and diverse: The independent stations, clearly, have reaped a direct benefit from the rules. Whatever the role of other factors, the independents would be in considerably worse shape if the rules had not made network programs more freely available in syndication. These are generally programs of higher than average quality and are clearly popular with audiences. But it is a mistake to assume that this is the only real consequence of the rules.

In fact, off-network syndication, also has important secondary consequences. As the benefits of off-network syndication have been diverted to independent stations, a better market for other types of syndication has developed. To the degree that independents become healthier and more competitive from off network re-runs, they are better able to buy original programming. Thus, the freeing up of off-network shows has allowed the independents to foster other forms of competition.

The advent of PTAR and the departure of the networks from syndication by a wide variety of established and new syndicators to fill the gap. Furthermore, the increase in competition has had important secondary consequences. Many syndicators are now providing first-run syndication in the improved market provided by viable independent stations.

Some of these are off-network syndicators as well, who can in effect use off-network revenues to finance original programming.[25] This would not have happened if

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[23] See Network Syndication—Financial Interest Rules, CBS ex parte presentation to the Commission, June, 1982.

[24] Staff Report at 334.

[25] The number of off-network sundicators who produce first-run syndication as well is still small, but increasing rapidly. Universal and Paramount have produced programs for syndication, and others such as Norman Lear have experimented with it. The fact that this is happening at all, however, is significant. Furthermore, there is the possibility for first-run syndication to expand as long as the independent stations maintain a secure revenue base from off-network programs.

syndication were controlled by the networks instead of independent syndicators: they are hardly likely to underwrite programming for the competition.[26]

Qualitative changes have also occurred. Independent stations are not simply filling their schedules with off-network programs; new formats have emerged, and independent stations are now running talks shows, documentaries, specialized music shows, original specials, and other varied types with greater frequency. Subjectively, one can quibble about the quality of some programs, but the proper role of government is to produce diversity, not to judge it. Increased diversity is the best indication of higher quality over the long run.

Obviously, the rules have not been totally successful. The Commission most likely would have perferred less reliance by independents on off-network syndication and more development of first-run programming. Another Commission goal that has run up against obstacles is the development of first-run syndication on network affiliates outside the prime time access period. But ventures such as Operation Prime Time, Mobile Showcase Network, "Fame", and others have made headway, and, with each new season, affiliates seem more willing to desert their network suppliers on an occasional basis. Surely, the existence of unrealized objectives should not obscure the changes that have occurred. The financial interest and syndication rules have aided independent stations and stimulated a more vigorous syndication industry. In conjunction with PTAR, they have created a stronger program market for first-run syndication, creating more opportunities for program producers. This has led to a greater diversity of program types, and considerably more flexibility in the non-network program "menu." The general trend is in the direction intended when the rules were adopted. If left in place, the rules should continue to promote change and experimentation in the future.

C. The rules protect creative incentives for producers: The rules were intended not only to stimulate non-network programing alternatives, but to promote competition and creative diversity in network programing as well. In fact, the rules have benefitted network producers directly in several ways which have furthered the public interest. Although critics of the rules insist this is economically impossible, it is important to remember that more than pure economics is at stake. Indeed, the economic changes brought about by the rules are significant not only for their own sake, but for the creative consequences which ensue.

One of the major arguments of the networks and other critics of the rules has been that producers cannot use syndication and subsidiary rights as means of "spreading the risk" with the networks. Thus, the producer retains the risk if a program is unsuccessful. The risk is substantial: only a small percentage of program ideas are developed into network series, and only a small percentage of those series become suitable for syndication. Superficially, the inability of the networks to share this risk would appear to make the producer market less attractive and therefore less competitive, than it was before the rules.

However, reality has apparently ignored the theory. For a variety of reasons, the advent of the rules has not brought about less competition among network program producers. One reason is that very little meaningful risk-sharing went on in the first place.[27] From the producer's point of view, producing network programs has always been wildly speculative. Program production has never been a low-risk investment, even when the networks supposedly could share the liability. Abolition of "risk sharing" did not provide a significant additional disincentive. Quite the contrary: the creative community seemed to welcome whatever additional risk it was taking on, and it continues to flourish in spite of, of perhaps because of it.

This suggests another reason why the rules have not brought about the predicted negative consequences. With the possible exception of casino gamblers and professional sports teams owners, there is perhaps no group less likely to behave like the ostensibly rational beings of economic theory than the people who create and produce television programs, particularly those who have not firmly established themselves. The odds against being successful are such that, facetiousness aside, one has to be a little bit crazy to try.[28] Nonetheless, indications are that there are plenty of

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[26] Perfect examples of this are Viacom and Worldvision, created the syndication arms of the networks when the rules required networks to divest them. Both are now producing first-run programming, which competes against that of their former network "parents."

[27] See pp. 7–8, supra.

[28] The FCC and critics of the rules generally assume that program producers and the three networks are—to use standard economic jargon—equally risk averse. But this ignores the simple fact of life that producers must take risks of an entirely different magnitude from those which the networks take. For producers, the obstacles to success are such that they simply cannot afford to be risk adverse. For the networks, even an unsuccessful program is not an extraordinary risk, because advertising revenues will absorb much if not all of the cost.

people who do try. This includes minorities, women, and purveyors of nontraditional or sensitive ideas: underrepresented groups who have traditionally had trouble breaking into program production. It also includes a large number of small, independent producers, some of whom have had intermittent success getting progams on the air, but all of whom still face considerable obstacles. Cost/benefit analysis alone does not dictate the decisions of these people. Such non-economic considerations as prestige, ego commitment to a cause, and desire for exposure, even in a money-losing venture, also motivate their conduct.

For the Commission's goal of diversity in programming to be realized, these are the people who must have the incentive to remain in the business. Without them, there is a loss of creative ferment in the industry, and a diminution in the number of ideas competing to become programs. This is exactly what the rules have prevented. They have helped a few small production companies to become well-established and successful, because they were able to translate initial network success into substantial returns in syndication and subsidiary markets. Even more important, though, it is the possibility of such success—despite the odds—which has encouraged many others to stay in competition. Without the rules, the networks would be able to buy programs outright, and would be particularly likely to do so when dealing with a small or untried producer. The rules guarantee that no producer need give up full ownership of a program idea in order to get it on the air. According to many people in the creative community, this is an essential protection. Without the guarantee of a proprietary right in one's work, there would be no prospect of capitalizing on its success. Although the networks would still be able to obtain programming, the incentives for producers would be such that fewer of them would compete to supply it.

D. More financing alternatives are available to producers: The rules have provided an incentive to the creative community by making entry more attractive, notwithstanding that economic theory insists it should not matter. Of course, incentive alone is not enough to sustain creative competition; financial support is necessary as well. In this area, too, the rules have had an impact. Even if the availability of network financing has diminished somewhat, other sources have arisen to provide support for producers. Indeed, the producer has many more options than before, because the departure of the networks has led to greater competition among potential bankrollers of creative ventures.

Without question, entry into the market and procurement of financing remains extremely difficult for smaller, less established producers. But the networks have made much of the supposed "squeezing out" of smaller producers since the rules went into effect. In fact, there is no evidence that this has happened. The FCC's own Staff Report, sometimes cited in support of this proposition, actually found no significant decrease in competition among producers of network prime time programs after the rules took effect. Moreover, the Special Staff acknowledged the difficulty of ascertaining the full scope of competition: they necessarily focused on successful producers, *i.e.*, those who have sold shows. The better measure is the number who have tried to sell shows. This is, of course, impossible to measure,[29] although trade press and other accounts make plain that many more producers have been able to enter the market, despite the long odds of actually making a sale.

One of the greater distortions in the current controversy is the notion that, with the rules in place the only competitors left are the major Hollywood studios. This obscures the true nature of competition in the industry. Institutional labels are deceptive in Hollywood; while there are certain companies who are clearly "major players" in production, the actual flow of creative talent is much more fluid. The major studios have their own "in-house" creative staffs, but a great deal of production is done by joint ventures between the studios and smaller independent producers. It is seriously misleading to categorize these different types of transactions as representing economic and creative monopolization of production by a few monolithic studios, especially when the alternative—network domination—is so clearly anti-competitive.

The amount of major studio involvement in joint ventures has increased under the rules, although the networks themselves bear part of the responsibility, since they often insist that new producers obtain an experienced partner. Small producers, inevitably, will lose some financial control and creative autonomy to the large partner. Nonetheless, there are advantages as well. As well-established suppliers, the studios have both the resources and the credibility to take some creative risks

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[29] The FCC's Staff Report concedes that "[C]ompetition in the development stage is more extensive than that for exhibited programs and . . . by focusing on exhibited programs, we may be overstating the extent of concentration in program supply." Id. at 288.

and aggressively promote them to the networks. And historically, the movie studios have been much more innovative than the networks, which have often proven more susceptible to the advertiser and rating pressures.

For the independent producer trying to sell a program, the road is still difficult, but the markeplace under the current rules offers a variety of options and a little leverage. Instead of having no choice but to render syndication rights to the networks on demand, the producer can use them to seek financial support from larger, more established producers, or from independent syndicators. Similarly, foreign distribution can bring a direct return to the producer, rather than more profits for the networks. These rights are no longer hostage to the networks' demands, but valuable commodities that can be offered in a competitive market. A producer can solicit many sources of support instead of just one, making it far more likely that the terms will be equitable and financial control not completely centralized.

All of this could easily disappear if the rules were repealed. History shows that when the networks were the only institutions able to control nationwide programming, they used this leverage on small and large producers alike, to the detriment of the creative marketplace. Instead, the rules have enhanced the competitiveness of producers at all levels. Large producers have certainly benefitted, but not at the expense of their smaller competitors. The entire industry has benefitted at the expense of network power.

By generating additional revenues for the creative marketplace, the rules have had subtle but important effects on creativity and diversity in programming. There are, of course, the "success stories": small producers who have become well-established sources of programming with the help of syndication revenues. But there is also a broader pattern of creative competition which the rules have encouraged. They provide an important incentive to producers, and they reduce the likelihood that producers will depend on a single concentrated source for their livelihood. There is every indication that creative competition has increased, and the creative community has clearly benefitted from the elimination of predatory network financial practices.

III. THE "NEW MEDIA" AND THE RULES

The impact of the emergence of suppossed new competitors for programming, such as cable, STV, and DBS, has been one of the most hotly disputed issues in the financial interest and syndication debate. In light of this new competition, the three networks have argued the rules are counterproductive because they undercut the networks' ability to compete for quality programming. Cable and other new media, it is said, can pay a "premium" (by buying syndication rights) which the rules prevent the networks from paying. The networks thus contend that the best programming will soon be unavailable to so-called "free" television.[30]

This argument raises serious public interest concerns. If advertiser-supported television is indeed superseded by viewer-supported television, many segments of the American public could be threatened with virtual exclusion from the informational benefits which television provides. The threat would be greatest for the poor, and would have a disproportionate impact on underrepresented groups such as minorities and the elderly.

As one who has spent the better part of the last 12 years trying to get the broadcasting industry to be more responsive to the needs of specialized interest, I find the networks' new-found concern for demographically unattractive groups to be amusing at best, and hypocritical at worst. that aside, the issue is one of great significance. But the claim, while of concern, proves to be utterly, completely, and totally devoid of merit. For one thing, the main beneficiary of the rules is "free" television itself—in the form of independent TV stations. What is threatened is not "free" television; it is network dominance of "free" television which is likely to erode somewhat. That, of course, is a primary objective of the rules.

A. The networks indisputably dominate the current television marketplace: Without question, the overall structure of the television industry has changed considerably since 1970. The emergence of new technology is a major part of this story, particularly in the past several years. But the networks indisputably remain as the dominant institutions in television, as they have been for thirty years. It is simply ludicrous to contend that the rules have already outlived their usefulness because of the anticipated or postulated emergence of the new media.

The most significant development over the last decade has been the emergence of the independent stations, not the proliferation of new technologies. The independ-

[30] See, e.g., "The Unsettled Future of Free Television," NBC Memorandum (Oct. 8, 1982).

ents, of course, are not "threat" to free television—they are a valuable addition to free television. The growth of the independents is consistent with the spirit of the rules and is a sign of their success.

The development of new technologies has, up to now, made much less difference to the networks' competitive position. The dizzying array of new transmission modes is impressive, but technological potential has not yet translated into economic reality for many of them. STV is in serious trouble, and STV outlets are rapidly declining in number. Other "alternatives" such as DBS and low power television, have not even reached the marketplace; yet others, such as MDS, are mere infants. To suggest that these are already alternative markets for program producers is absurd. To predict their future impact on the marketplace is for soothsayers, not Congress or the FCC.

Even the proliferation of cable has not yet seriously threatened the networks. Happily, both basic and pay cable have made a difference in the marketplace; their expansion has been a significant plus. At this point, though, at least two thirds of the television households in Americe still have no form of cable. But so far, cable channels have competed more with each other than with the networks—they, too, are declining in number rapidly, and many survivors are in financial trouble.

There are several areas in which cable has made significant inroads against traditional broadcast television. Most obvious of these areas is the first-run movies market, which has been for the most part captured by Home Box Office and a few other pay services.[31] The networks have also faced some competition for sports programming, although the economics of mass audience draws dictate that most sports events of national significance will remain on "free" TV. Significantly, however, the financial interest and syndication rules have had little to do with the competitiveness of cable against the networks. The primary value of both movies and sports events comes from their initial or "live" broadcast. This is especially true for cable, which builds its subscriber base by providing movies and sports before they appear on the networks. The ability to obtain syndication or subsidiary rights is of little consequence to cable, and probably adds little to the price tag it is able to pay.

In original programming, particularly series programming, cable has made much less headway. In this area, syndication and subsidiary rights can be considerably more valuable, because the success of the initial broadcast is much more speculative than it is for first-run movies and live sports events. However, cable has devoted a relatively small portion of its resources to the development of original programming, particularly network-quality programming. Despite the advantage supposedly conferred on cable by the rules, cable services can normally pay only a fraction of what the networks pay for original programs. Some television producers have gravitated to cable for the creative freedom it offers, but few have left the networks because they could make better money elsewhere. Despite a handful of well-publicized attempts to take already established series away from the networks—generally after a network had already cancelled the series—cable has simply not become a competitive alternative market for network program procedures.

The networks, meanwhile, show many signs of continuing health and dominance in television. In spite of a slight decline in their audience share over the past several years, almost entirely to independent stations, the networks continue to take the lion's share—over 80 percent during prime time. Even in slumping economies the networks have dramatically increased their advertising revenues each year. The networks attract much of their audience from people who have cable or other alternatives available to them.

Taken as a whole, the present state of the television industry seems to make a case for retention, not repeal, of the rules. The networks remain essentially healthy. At the same time, both broadcast and non-broadcast alternatives have chipped away at network dominance. Some of this change should be attributed to the rules; some is the result of developing technology. However, the initial appearance of competition does not eliminate need for Commission concern: administrative remedies are not self-cancelling at the first sign that they are succeeding. Moreover, technological change cannot accomplish everything the rules were supposed to do. This argument mistakes consistency for redundancy: the rules have primarily promoted one type of competition, through independent stations, while technology offers an entirely different type, through cable and its companions. The two are not mutually exclusive. In fact, the claim that new technology has obviated the rules sounds suspiciously

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[31] Perhaps more accurately, cable has *created* a market where the networks could not. It is not the rules which have led to this development, but the ability of cable services to run movies without editing or commercial interruption.

like a network stalking horse—an argument which disguises the principal network goal of undermining independent stations.

B. The "new media" face an uncertain future: The absence of a present threat to network strength—much less network survival—clearly reveals how much the question of "new media" deals with the future. However, policymaking based on projection should be done cautiously. In 1970, the Commission adopted the rules after a decade of careful monitoring. The current debate over the impact of new media, by contrast, is very recent, because technological development has been so rapid in the last several years. It is an area where speculation abounds and hard data is scarce.

No one disputes that the new media will continue to expand: more households will acquire cable, more people will subscribe to pay services, and numerous alternatives to both traditional broadcast and cable will become more available in the marketplace. In all likelihood, the changes which occur in the next several years will have an important effect on the long-term future of both the networks and their competitors. However, knowing that change is likely is a poor substitute for knowing what form that change will take, or what consequences it will have. The proliferation of new technologies is still in such an early phase that the range of future possibilities remains wide open.

This is not the picture painted by the networks, of course. In dramatic terms, they are proclaiming the inevitable demise of free television as we know it in a matter of years. The major reason for this, they argue, will be rapid expansion of pay cable, which will become the dominant purchaser of high-quality programs because of its disproportionate market power.[32] According to studies commissioned by the networks, pay cable earnings will soon eclipse that of the three networks. A major factor, the networks claim, will be their inability to offer more to producers because the rules prohibit their acquiring syndication revenues. The result will be a siphoning of quality programs away from the networks for the sake of a narrower, more exclusive audience which can afford to pay for them.

These arguments and projections should certainly be taken seriously, but there is ample cause for skepticism. First, they disingenuously ignore the role the networks are themselves playing in the expansion of new media. Each of the networks is investing heavily in various types of new technology. This is perfectly appropriate, for it is to the networks' advantage to "buy into" potential competition and thereby control its development. But such activity undercuts the notion that the networks face monolithic opposition by forces beyond their control. Judging by the current business climate, the networks may have as much interest as any one else in developing pay television at the expense of "free" television.

Setting aside the networks' new media investments, their projections of future competition against them are inconsistent depending on their audience and the issue under discussion. In the first place, their arguments are significant for what they exclude. Whatever the future of network competition with pay cable, the networks are consistently optimistic about their own overall future in terms of audience share, ability to attract advertisers, and profitability. They appear unconcerned with many of the other new technologies cited by the Commission as possible alternate markets for programs. The networks generally assume that their share of the audience will continue to decline, but very slowly—perhaps to 70 percent by 1990—and with the overall size of the audience expanding at the same time.[33]

In short, the networks have no doubt that they will continue to be "the networks," the only institutions capable of consistently reaching the entire nation through television. The independents, advertiser-supported cable, low-power television and other potential competitors will largely be left to fight among themselves for the remainder of the market. Moreover, new media programming will by and large be more specialized than network programming, making them less likely to compete for producers of network-quality programs. This view of the future certainly does not suggest that the proliferation of technological alternatives is going to have a salutary effect on the networks, making the rules somehow superfluous. The

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[32] "Free television is facing the greatest challenge in its many years of contributions to American culture and society. The challenge of this competition may be healthy, but only if free and pay TV are placed on a fair footing. . . . If not, the Federal Government bias for pay television will increasingly diminish the service now available to all Americans." "The Unsettled Future of Free Television," at 10.

[33] See, e.g., comments of Grant Tinker, Chairman of NBC: "[W]e all know we're talking in our business about a smaller piece of the whole, a declining share [of audience], but because that universe is growing, we're going to absolutely [stand] about as well in 1990 as we do now. And it's going to be a dynamite business." Communications Daily Dec. 6, 1982, at 8 [brackets in original].

networks profess not to be worried by many competitors, only by one. Their new media rationale boils down to the competition they expect from pay cable.

C. The networks are inconsistent about the threat of pay television: However, in this area also, the networks have not been consistent. At the same time that they have been touting studies which show the apparent threat of pay cable, they have also released other projections which tell quite a different story. One network study gives cable a $1.5 billion margin in purchasing power by 1990—although it does so by lumping together both basic and pay cable.[34] Another study flatly says that the economics of original production by pay cable are " 'not encouraging' " because costs will go up without " 'a corresponding increase in revenues.' " [35]

These wild variations in network projections suggest that the networks are manipulating their numbers to present an alarmist scenario for the purposes of this debate. At the very best, they suggest that the networks know less than they claim about what is going to happen, because of the large number of variables and assumptions which go into these projections. However, the networks have no cause for the sort of unbridled pessimism they are professing. It is worth noting some of the assumptions that are implicit in their gloomier projections. First, cable and pay cable must increase their penetration at a rapid rate—with pay cable reaching about three times its present number of subscribers by 1990. This is probably a reasonable assumption, but the networks' revenue projections then assume that all of these subscribers will pay perhaps six times as much as current subscribers do for pay service.[36]

Even if this assumption is reasonable, there is the question of how revenues will translate into buying power. Aggregate revenues will be divided among different services. How many pay services will there be, and how will they compete? The more services there are, the more likely that pay cable revenues—and therefore buying power—will be fragmented, not concentrated. Furthermore, these competing services will have to contend with each other as well as the networks. Even if viewers are willing to subscribe to more than one service at a time, there still will be considerable competition among different services for the subscriber market. In sports and first-run movies, the limited amount of available material makes fierce competition especially likely. This casts doubt on the assumption that pay cable will be able to use its buying power collectively as a monolithic force against the networks.

At least one network study predicts just such fragmentation in the competition, making it difficult for any pay-cable service "to challenge the networks on a regular basis." [37] Aside from this, there is little evidence that the presence of the rules will make any more difference to pay cable—or any other new technology, for that matter—than it has in the past. Movies and sports are likely to be the continuing staples of pay-cable fare. While the amount of made-for-television programming may also increase, it takes a major leap of logic to assume that pay cable will be able or anxious to take over from the networks in them to invest heavily in original short form program development, with or without the possibility of acquiring syndication rights, since their competitive position is better served by other formats.[38] Conceivably, cable could make further attempts to "pirate" successful network series, but their ability to acquire syndication rights will not be attractive to producers, since success on the networks will give producers incentive to retain those rights.

Given the contradictions in the networks' view of the future, their claims of an imminent threat to "free television" are clearly overwrought, and more than a little suspicious. There is a distinct undercurrent of network optimism present, and many corresponding signs of tentativeness and pessimism among the new technologies. While there continues to be rapid volution in the new media, it is interesting to note how quickly conventional wisdom about the future changes. Talk of a "video revolution" several years ago has been replaced by talk of a slow growth and

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[34] *Electronic Media,* Dec. 9, 1982, at 1.

[35] "CBS Eyes Future Role in TV World," Broadcast Week, Dec. 13, 1982, at 26 [quoting CBS study].

[36] An HBO subscriber currently pays about $100/year. Assuming that there are 100 million television households by 1990, and that 45% of them are pay cable subscribers, it requires an average payment of over $700/year per subscriber to generate $16 billion in revenues for pay cable services.

[37] The Video Marketplace in 1990: Diversity and Growth in Perspective, CBS Broadcast Group Report, March 1982.

[38] Even if cable does invest in original programming, acquisition of syndication rights makes sense only if the programs are suitable for over-the-air broadcast. Much cable programming has "adult" content, such as nudity, extreme violence, or profanity, which is unmarketable in broadcast syndication.

"shake-outs." For network producers, the prospect of a strong competing market provided by new media seems to have receded.

The uncertainty of the marketplace suggests another reason for retaining the rules. Even if the Commission concludes that network projections are credible, it cannot ignore the fact that they are no more than projections. The "threat" to the networks, and to the public, is still a thing of the future, based largely on speculation in an industry that is undergoing constant and rapid technological change. This change may well bring about significant shifts in the marketplace, but predicting those shifts is inevitably risky when so little solid information is available. As has happened in the past, unexpected technological or economic developments can make the most reliable projections instantly obsolete.

Taking action based largely on projections and speculation is unsound public policy. The pattern of rapid evolution in the marketplace creates a strong argument for regulatory stability: changing the rules in the middle of a fast-moving game can contribute to further uncertainty and confusion. Repeal of the financial interest and syndication rules is likely to have just such an effect in the present marketplace. It will eliminate a purely speculative threat from new technologies which still offer more promise than performance. As the marketplace develops, there will be ample time to determine whether new technology truly threatens "free" television, and to take action accordingly.

Senator GOLDWATER. Thank you very much.

Bob, do you have any questions?

The CHAIRMAN. Yes. I wonder if I might ask, on LULAC's support initially and then your decision within the last year to change, was one of the things that you asked from NBC a $250,000 contribution to the Hispanic education fund?

Mr. TORRES. When we asked the networks, we went to NBC first, because NBC appeared to be the most responsive. The $250,000 was not for the league, not for LULAC. It was to create a fund in which many of the people that all networks were invited to meet with in San Diego in June of last year would assist in creating an entity that would begin to deal with all the networks in providing producers, providing names of resources of Hispanics, eligible people who could work in the networks, producers who would like to develop——

The CHAIRMAN. I understand that. It was one of the things you asked of NBC at the time?

Mr. TORRES. Yes, but the proposal we submitted to NBC was a very preliminary proposal, and I would think that that was something that we would have liked to have kept in there, because that was part of institutionalizing the effort of the networks to reach out and diversify their situation.

The CHAIRMAN. Did they give you the money?

Mr. TORRES. No, sir; they did not.

The CHAIRMAN. And you subsequently changed your position?

Mr. TORRES. No, sir. If there is an implication or assumption on your part to associate our withdrawal of support simply because we did not get $250,000——

The CHAIRMAN. I did not make any—but you did subsequently change your position?

Mr. TORRES. Yes, but not right after that decision, sir.

The CHAIRMAN. Thank you.

Ms. Asselin, you used twice the term "pro-social show." You used it with some producer that was selling to ABC, and they say if you bring us another pro—What was it you said?

Ms. ASSELIN. Well, I described the "Fat Albert" series, which is an animated series that has received a lot of attention as a pro-

social show. It cuts across—you know, it features racial minorities as the animated characters, and the person I quoted was Lou Shymer. I did not say ABC. I did not know——

The CHAIRMAN. Some network said, do not bring us another pro-social show?

Ms. ASSELIN. Like "Fat Albert." In other words, "Fat Albert" has had its time, and that time is not now.

The CHAIRMAN. Tell me again what a pro-social show is.

Ms. ASSELIN. Well, that is a description used in connection with "Fat Albert" by critics and by educators. I would extrapolate just from the words what it means is that it attempts to inform the viewer about social trends. I know that—well, in other words, it is a contrast to purely white bread programing.

The CHAIRMAN. Purely what?

Ms. ASSELIN. White bread programing, a commonly used phrase which means that it cuts across concerns of various members of our population, rather than only middle-class whites.

The CHAIRMAN. Let me——

Ms. ASSELIN. It gives a fair representation, a fair role model, if you will.

The CHAIRMAN. My hunch is that your and my social views would not differ very much, and I saw Peggy Charren in Boston a couple of weeks ago when she gave me $100 for my campaign for reelection.

Ms. ASSELIN. I hope you gave her $100 for ACT.

The CHAIRMAN. I often give her more than that. But I am curious if your definition of pro-social programs is putting on programs that you and I think are good for the public.

Ms. ASSELIN. Well, this gets into the whole discussion of access and diversity which has gone on, how do you get it, and I feel, being an old Fortune reporter, I know that business is business, but I feel that the networks are not business as business. I feel that they have a public trust, and that there should be some broader access.

I feel, for example, when I cast a network special that I am producing, I try to give some attention to that casting in terms of an overall look at it. If I walk down the streets of New York, I do not see all one kind of person. I see a lot of kinds of people, and yet often when I look at television, which is supposedly representative of our world today, it is not so diverse.

So, I think visual——

The CHAIRMAN. Should radio reflect that, too?

Ms. ASSELIN. Well, I have never had to cast a radio show. But certainly radio would be able to represent different points of view verbally, but I believe strongly in visual impact. I am in a visual medium. So that if I cast a crowd, if I casted it diversely, I think I would case it pro-social, pro-social being representative of the world as it is today.

The CHAIRMAN. Are you familiar with the *Simon Geller* case?

Ms. ASSELIN. I am not. I have never heard of it.

The CHAIRMAN. Mr. Schwartzman, you probably know of it.

Mr. SCHWARTZMAN. Yes, I do, Mr. Packwood.

The CHAIRMAN. Do you think Mr. Geller should have lost his license?

Mr. SCHWARTZMAN. Based on my familiarity with the *Simon Geller* case, I think that any broadcast licensee should be held to keep the promises that they make to the FCC when they seek their license in the first place. My understanding is that on the so-called promise versus performance issue, Mr. Geller fell far short of his promises. If he had proposed a different kind of programing which in fact comported more nearly with the programing which he actually carried, my answer might well be very different, Senator Packwood.

The CHAIRMAN. Actually, they took his license away because he did not have sufficient program diversity, not because he did not put on his station what he initially said he would. What it was, Ms. Asselin, was a station in Gloucester, Mass., a very low budget operation that programed only classical music, owned by Mr. Geller, run by Mr. Geller. He was the classical music disc jockey. And no complaints, not a single complaint ever filed with the FCC.

He applied for renewal, and his license was declined because the competitor who filed against him said they would put on traffic reports and accuweather and things of that nature. Now, although Gloucester gets 40 other radio stations, is that a good or a bad social policy, to take his license away?

Ms. ASSELIN. Is this the case where they had to decide between giving him a license and giving someone——

The CHAIRMAN. He had the license, and it was up for renewal.

Ms. ASSELIN. It was being taken from him and given to somebody who offered a broader program?

The CHAIRMAN. Yes. They indicated—they specifically mentioned that they would do news, they would do weather, they would do traffic.

Ms. ASSELIN. That does not strike me, given the fact that you have said there were 40 other stations, as a positive move at all, because I think that when we get to the place in the network television arena where in fact cable is competitive, and in fact Mr. Torres gets a whole channel to himself, that we will all look at these issues differently. I am just talking about the access as it is today, which is, you know, three bridges across the river, and really one. There has been a lot of talk about——

The CHAIRMAN. You say, when Mr. Torres is given a channel all to himself. How many television channels are there in Los Angeles or in that area?

Ms. ASSELIN. Probably 9 or 10.

The CHAIRMAN. That is all you could get on cable there, 9 or 10?

Ms. ASSELIN. Oh, cable.

The CHAIRMAN. How many stations can the listener at home get on cable?

Ms. ASSELIN. I cannot speak about that.

The CHAIRMAN. Does anyone know?

Mr. Torres, is there an Hispanic station broadcasting in Spanish?

Mr. TORRES. In Los Angeles, yes, there is an SIN affiliate in Los Angeles.

The CHAIRMAN. Given that many outlets, I am curious why you would need any kind of quantification of program direction. You said when cable reaches that kind of density. My hunch is, just taking a guess, you probably got at least 20 and maybe more sta-

tions in Los Angeles. Why should any of them be told therefore what they have to program? You have plenty of diversity. You have a Hispanic station.

Ms. ASSELIN. Well, let me say that I am here representing children's programing, and in that sense, what I am asking for is, I know that the kind of programing that I have produced and the networks have put on does not respond to the hard, cold yardsticks of profitability, and yet I believe that there are special interests that need access, and I believe they need access because it is a public air wave. It is not—I mean, NBC does not own that air time.

The CHAIRMAN. What you are saying is, it does not matter if there are 20 or 30 or 40 stations, there is no profit in children's programs. Is that what you are saying?

Ms. ASSELIN. Pardon me?

The CHAIRMAN. It does not matter how many stations there are, television stations in an area. Mr. Torres—they have an Hispanic station, but apparently there is a sufficient market to justify it, and they can afford to stay on the air, but you are saying there is not enough profit in children's programing that any of those 30 or 40 stations are going to carry children's programs.

Ms. ASSELIN. No. What I am advocating here is broadly based access, and you know, I am not the one to speak about the minority issue. However, I have listened carefully to panels on minority interests, the one specifically that spoke in front of the Wirth-Waxman committee, where Sidney Poitier and Bernie Casey spoke very movingly about the fact that they, although they represented 12 percent of the population, in fact represented 20 percent of the viewing population, and yet the role model they could have their children look to was Mr. T. They were really very—they spoke poignantly on the subject of role model.

It seems to me that the black population in this country, and if I—I am not sure of these figures, but it seems to me the Hispanic population is even larger in number, that at this point they should get broad access, that they should—well, "should" is such a bad word. They should not be in one little station, but I did not come here to talk about minority interests. I came to defend children's programing.

Mr. TORRES. Mr. Chairman, if I could respond——

The CHAIRMAN. And you have done a good job.

Mr. TORRES. If I could respond very briefly to Mr. Packwood's line of questions. It is very interesting, Senator, the line, the direction you are taking with your questioning. I would assume, and please correct me if I am wrong, and I would assume that you will, that if in fact because there is a great deal of cable television, because in Los Angeles there is a tremendous amount of diversity, I think you indicated over 100 channels of viewing in Los Angeles, that because there is that tremendous diversity, that the networks should be allowed to misrepresent minorities on television, to only show negative stereotypes primarily, to show very few minorities on the screen, to have very few Hispanics or minorities behind the scenes, to do very little to institutionalize any outreach efforts.

Correct me if I am wrong, but it would almost seem to me that that is the direction of your questioning, that because there is diversity out there, that whatever may be done by the networks is

excusable because there is diversity, and if we do not like what we see on the networks, we can easily pay for pay television.

The CHAIRMAN. I am saying it is like Simon Geller. If he chooses to broadcast classical music all day, should he have his license taken away? No, I do not think he should. What if he chooses to broadcast rock and roll all day? Should he have his license taken away? No. What if he chooses to have a talk show all day long?

Mr. TORRES. What happens when a network suggests and decides to simply show minorities in a continued negative light when in fact that is a very, very dangerous thing for American society in general to see? Are you saying that should be allowed?

Ms. ASSELIN. Can I say——

Senator GOLDWATER. Pardon me. The red light has been on for some time, and we have a vote coming most any minute. I have to apologize for this, but it is an exceptionally long hearing. Senator Wilson, we are going to have to forgo you now in the interest of getting over there to vote. So I am going to thank all of you for coming here, and I particularly want to apologize to my friend, Arnoldo, for misstating your name.

Mr. TORRES. That is OK, sir.

Senator GOLDWATER. So thank you very much. You have been a great addition.

[The following information was subsequently received for the record:]

LEAGUE OF UNITED LATIN AMERICAN CITIZENS,
November 7, 1983.

Hon. BOB PACKWOOD,
259 Russell Senate Office Building,
Washington, D.C.

DEAR SENATOR PACKWOOD: This letter is intended to provide you a more extensive and clear response to the question you asked of me during hearings on S. 1707 on November 4, 1983. Specifically, you asked the following:

Question. Did you, the League of United Latin American Citizens, (LULAC) propose to the National Broadcasting Company (NBC) that they contribute $250,000 to the Hispanic Network Fund? Did NBC provide such a contribution and did you alter your position on the FCC rule after this?

Answer. My response was that we had and that our proposal was a rough draft for a LULAC/NBC understanding to improve its outreach efforts to Hispanics. Creation of this fund was only one of several components included in our rough draft letter of understanding. It was designed and intended to improve the hiring of Hispanic on and off the camera and to provide an institutional mechanism designed to assist the network in establishing and providing on-going dialogue and outreach with the Hispanic community, its actors, producers, and interested potential employees.

In addition, I expressed serious concern that you appeared to imply that LULAC had altered its position on the FCC syndication rule as a result of NBC's decision not to agree to our fund proposal. I would like to further clarify this matter by stating, as I did on the record, that this decision not to agree to our proposal for the creation of this fund had nothing to do with altering our position. In an effort to have NBC agree to a comprehensive proposal, we discussed a number of alternatives including our last effort for a verbal agreement to establish specific goals and timetables for hiring more Hispanics on and off camera. At no time was the creation of this Hispanic Network Fund a major obstacle to agreeing on an institutional commitment by NBC to hiring Hispanics on and off camera.

While I am aware that you stated that you were not implying anything, we simply wanted to take this opportunity to clarify our position. In addition, we have enclosed a copy of this rough draft and would suggest that should you have any further questions they can be directed to me or Mr. Robert Gnaizda, LULAC Legal Counsel, who handled our negotiations with NBC and the other networks and studios, Ms. Betty Hudson or Mr. Jay Rodriguez, officials with NBC who represented the network during our discussions.

In an effort to insure that your questions not be misinterpreted by the subcommittee or others reviewing these hearings on S. 1707, we are requesting that the subcommittee include this letter and rough draft as part of the formal hearing record.

We thank you for your interest and the opportunity to respond to your concerns. Again, our support for S. 1707 and opposition to repeal of the syndication rule is due to the networks lack of commitment to seriously implementing efforts to improve the portrayal of Hispanics on television.

Respectfully,

ARNOLDO S. TORRES,
National Executive Director.

NATIONAL HISPANIC LEADERSHIP CONFERENCE,
November 11, 1983.

Hon. BOB PACKWOOD,
259 Russell Senate Office Building,
Washington, D.C.

DEAR SENATOR PACKWOOD: It has been called to my attention that you raised a question concerning a proposal submitted by the League of United Latin American Citizens (LULAC) to the National Broadcasting Company (NBC) during my term as National President. The inquiry as posed by you apparently implied that LULAC had reconsidered their position of the Syndication Rule because of the failure of NBC to contribute money for the establishment of an Hispanic Network Fund.

Since I was the chief negotiator with NBC and other networks at the time I thought it was important you be fully aware of the action taken by me in my capacity as National President. For some time we had been negotiating with the networks concerning the need for having more Hispanics on and off camera. During the course of those negotiations, the Syndication Rule change surfaced and after meeting with network officials and our Board, it was decided we would support the television industry's position on this vital issue. Sometime prior thereto, our legal counsel, Bob Gnaizda, and I got together and drafted a proposed agreement that incorporated the establishment of the Hispanic Network Fund. At no time did the request for the establishment of this Fund in any way relate directly or indirectly to our position on the Syndication Rule. It was simply part of an overall proposed agreement which we presented to NBC.

Although I was not present at the recent Board Meeting of LULAC, I suspect they altered their position on the Syndication Rule change because all the networks have failed to substantially change their attitude toward the use of Hispanics on and off camera. In the meantime, negotiations have continued with the networks in an effort to reach some type of an agreement, verbal or written which would address our concerns.

I trust this letter clarifies the LULAC position based on my own involvement and that you will feel free to make this letter part of the hearings held on November 4th, 1983 relating to S. 1707.

A copy of this letter is being forwarded to Mr. Bob Gnaizda, Mr. Jay Rodriguez, Vice-President of NBC, and Mr. Arnold Torres, Executive Director of LULAC.

Thank you very much.

Yours truly,

TONY BONILLA.

Senator GOLDWATER. Now, for our last panel, Ms. Willette Coleman, National Black Media Coalition; Mr. Jacob Clayman, president of the National Council of Senior Citizens; Mr. William Kehoe, executive director of American Legal Foundation. Welcome to the meeting, and we will observe the lights up here, and if you have a prepared text and would like to just briefly summarize, the text will be printed in the record as if read. And I guess we will start with you, Ms. Coleman.

STATEMENTS OF WILLETTE COLEMAN, NATIONAL BLACK MEDIA COALITION, WASHINGTON, D.C.; JACOB CLAYMAN, PRESIDENT, NATIONAL COUNCIL OF SENIOR CITIZENS, WASHINGTON, D.C.; WILLIAM KEHOE, EXECUTIVE DIRECTOR, AMERICAN LEGAL FOUNDATION, WASHINGTON, D.C.; AND KEVIN CAMPBELL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, WASHINGTON, D.C.

Ms. COLEMAN. Thank you, Senator.

Mr. Chairman, members of the committee, you know my name. It is Willette Coleman. I am associated with the National Black Media Coalition, an organization which for over a decade has represented the interests of black viewers and black professionals. I have been involved in television business as an independent producer. I very much appreciate the opportunity to appear before you today.

Mr. Chairman, as we testified before the FCC many months ago, NBMC's examination of these rules leads us to conclude that repeal would be in the interest of black viewers and black professionals. NBMC believes that repeal or modification of these rules would serve two very important purposes.

First, we believe that repeal would provide significant benefits in the form of opportunities long denied minorities, particularly minorities involved in the production of television programs. These benefits, in our view, would be much more likely to be achieved if the major networks were free to participate in the financing and marketing of independently produced programs.

Second, repeal would help to assure a continued flow of free television programs to black viewers, many of whom cannot either receive or afford other services, and who depend on free television for entertainment, public affairs programs, news, and sports. NBMC recognizes, as has every independent analyst, that the rules passed by the FCC in 1970 have simply not done the job. NBMC favors elimination of these rules precisely because we believe this would create the potential of enhanced competition and diversity, what the rules were designed to do, and what they have in our view failed to accomplish.

A more competitive market with new sources of financing can only help foster a greater variety of program producers, including those made up primarily of blacks, Hispanics, and other minorities. NBMC did not come to these conclusions easily. We have been critical of the networks for not hiring enough minorities in key positions, for not using the services of many blacks, Hispanics, and other minorities who work as managers, executive producers, writers, and actors, and, of course, for what we believe to be insensitive portrayals of minorities in television.

Over the 10-year existence of NBMC, we think the networks have made some progress in some of the areas, but we also think there is plenty of room for improvement, and we intend to work in those areas. However, on balance, we firmly believe that repeal of these rules will be beneficial for blacks both in and out of the television industry. We have been disappointed with the lack of high quality programing featuring on and off camera participation by

black media professionals and using subjects that are of interest to blacks and other minority citizens.

As I mentioned before, NBMC has studied the issues carefully, and we believe that in part due to the syndication and financial interest rules and the parallel provisions in the consent decrees, black producers and actors have been forced to look primarily to the established Hollywood studios for other sources for their financing. For all practical purposes, the networks have not had the incentive to become active in the encouragement and financing of innovative programs that use black professionals.

The results of this system have been far from satisfactory for black Americans and other minority citizens. We want greater use of black and minority producers and performers. We think this will inevitably lead to programing that is more responsive to the needs of America. NBMC believes there is nothing to lose and may well be much to gain by letting the networks into the system.

We know the networks have money. We would like to see some of that money channeled to blacks and other minorities who are working in the production of software.

One question that has been raised is, why have networks not been more active in financing minority production efforts while the rules have been in place? A network is unable under the rules to take advantage of future revenues by syndicating programs for possible sale to independent stations. Without the incentive of a share in program ownership and possible future revenues from syndication, we recognize that it makes little financial sense for networks to become involved with anyone else other than proven suppliers.

Simply put, the rules eliminate this risk potential and thus hurt first time producers, many of whom are minorities.

There is a second reason why NBMC supports repeal of these rules. NBMC sees these rules as inhibiting the ability of the free broadcast networks to negotiate for programs on the same terms as television and especially pay cable. If this unfairness continues, the better programs will ultimately be seen on pay services by a few rather than on the networks by many.

Also, because cable may never become available in many areas and has resisted building in the inner cities where many minorities live, NBMC is concerned that large numbers of the minority community and others may not have these services available to them for the foreseeable future. Even if they become available, the cost of these services may well be prohibitive to many segments of our society.

In our view, blacks, Hispanics, and other minorities have been relegated to second-class citizenship in many areas of life. We do not want to become subject to a second-class television service as well.

Mr. Chairman, I would like to conclude on a note about the status quo. We at the NBMC have always favored change when we see conditions that are not good for black Americans. This issue is no exception. Several weeks ago, during the Congressional Black Caucus Week, numerous black and other minority producers and performers appeared before Congresswoman Collins and protested the fact that minorities were not working and were not producing programs.

This is an intolerable situation that is only perpetuated by maintaining the status quo. These rules are the status quo and have been for over a decade. It is time to upset the status quo. It is time for a change. On this issue, the network position represents change, a chance to abandon over a decade of the status quo.

Mr. Chairman, that concludes my remarks.

Thank you.

[The statement follows:]

STATEMENT OF WILLETTE COLEMAN, NATIONAL BLACK MEDIA COALITION

Mr. Chairman, my name is Willette Coleman. I am associated with the National Black Media Coalition, an organization which, for over a decade, has represented the interests of Black viewers and Black professionals in the mass media. I have also been involved in the television business as a producer.

I very much appreciate the opportunity to appear before your committee today and present testimony on S. 1707, the so-called Wilson bill which would block the FCC from considering changes in the Financial Interest and Syndication Rules. Mr. Chairman, as we testified before the FCC many months ago, NBMC's examination of these rules leads us to conclude that repeal would be in the interest of Black viewers and Black professionals. NBMC believes that repeal or modification of these rules would serve two very important purposes: first, we believe that repeal would provide significant benefits in the form of opportunities long denied minorities—particularly minorities involved in the production of television programs. These benefits, in our view, would be much more likely to be achieved if the major networks were free to participate in the financing and marketing of independently-produced programs. Second, repeal would help assure a continued flow of free television programs to Black viewers, many of whom cannot either receive or afford other services and who depend on free television for entertainment, public affairs programs, news and sports.

NBMC recognizes—as has every independent analyst—that the rules passed by the FCC in 1970 have simply not done the job. Back then, the FCC stated that the program supply market was "seriously unbalanced to the disadvantage of independent producers and a freer, more diversified television production and distribution process." Now, thirteen years later, we find that these rules have not worked. I don't have to go into all that has been said about these rules; I will just quote one sentence from the FCC's tentative decision on the financial interest rules which has great significance for Black producers and performers: "To the extent the rules, by excluding efficient sources of financing from the market, create barriers to market entry or create pressures for smaller producers to join with larger firms, the rules are operating in a manner contrary to their stated purpose and serve no valid public purpose." NBMC favors elimination of these rules precisely because we believe this would create the potential of enhanced competition and diversity—what the rules were designed to do and what they have, in our view, failed to accomplish. A more competitive market with new sources of financing can only help foster a greater variety of program producers, including those made up primarily of Blacks, Hispanics and other minorities.

NBMC did not come to these conclusions easily. We have been critical of the methods for not hiring enough minorities in key positions, for not using the services of the many Blacks, Hispanics and other minorities who work as managers, executive producers, producers, writers and actors, and, of course, for what we believe to be insenitive portrayals of minorities on television. Over the ten year existence of NBMC, we think the networks have made some progress in some of the areas, but we also think there is plenty of room for improvement and we intend to work in those areas. But, on balance, we firmly believe that repeal of these rules would be beneficial for Blacks both in and out of the television business.

Let me be more specific as to the reasons why we support repeal. Throughout its existence, NBMC has been concerned with the unfair exclusion of Black performers and Black producers from participation in the lucrative video industry. We have been disappointed with the lack of high quality programing featuring on and off-camera participation by Black media professionals, and using subjects that are of interest to Blacks and other minority citizens. As I mentioned before, NBMC has studied the issue carefully and we believe that, in part due to the syndication and financial interest rules and the parallel provisions in the consent decrees, Black producers and actors have been forced to look primarily to the established Hollywood

studios or other sources for their financing. For all practical purposes, the networks have not had the incentive to become active in the encouragement and financing of innovative programs that use Black professionals. The results of this system have been far from satisfactory for Black Americans and other minority citizens. We want greater use of Black and minority producers and performers; we think this will inevitably lead to programing that is more responsive to the needs of minority America. NBMC believes there is nothing to lose and may well be much to gain by letting the networks into the system. We know the networks have money; we would like to see some of that money channeled to Blacks and other minorities who are working in the production of software for the video industry.

One question that has been raised in the dialogue surround the proposed repeal or modification of these rules is why the networks haven't been more active in financing minority production efforts while the rules have been in place. Basically, I think the response to this question lies with the way television programs are used after they are made and the allocation of risk that can be accomplished by multiple uses of program product. Because many minority producers are attempting to get a foothold in the business, there is no question that a program underwriter must be prepared to accept more risk and possibly higher costs than when dealing with one of the major studios or producers. This is especially true of programs or ideas that may appeal to more specialized tastes. In any event, what these rules do is to severely limit the ability of the networks to spread this above-normal risk, and theoretically higher costs, over multiple uses of the program—like everyone else who produce and market programs does. Thus, a network is unable under the rules to take advantage of future revenues by syndicating programs for possible sale to independent stations or even public television stations once a show has been on the network. Without the incentive of a share in program ownership and possible future revenues from syndication, we recognize that it makes little financial sense for networks to become involved with anyone else other than proven suppliers. Simply put, the rules eliminate this risk spreading potential and thus hurt first-time producers.

There is a second reason why NBMC supports repeal of these rules. NBMC sees these rules as inhibiting the ability of the free broadcast networks to negotiate for programs on the same terms as pay television and especailly pay cable. If this unfairness continues, the better programs will ultimately be seen on pay services by a few, rather than on the networks by many. Also, because cable may never become available in many areas and has resisted building in the inner cities where many minorities live, NBMC is concerned that large numbers of minority citizens and others may not have these services available to them for the foreseeable future. Even if they becom available, the cost of these services may well be prohibitive to many segments of our society. As everyone knows, most major motion pictures appear on various pay services before they are made available to network TV. The same situtation will develop with other entertainment programs if these rules are not repealled. Programs that many of use are used to seeing on the networks may be captured by pay where only a relative few will be able to afford the cost of seeing them. In our view, Blacks, Hispanics and other minorities have often been relegated to second-class citizenship in many areas of life; we don't want to become subject to a second-class television service as well.

Mr. Chairman, I would like to conclude on a note about the status quo. We at the NBMC have always favored change when we see conditions are not good for Black Americans. This issue is no exception. Several weeks ago during the Congressional Black Caucus Week, numerous Black and other minority producers and performers appeared before Congresswoman Collins and protested the fact that minorities were not working and were not producing programs. This is an intolerable situation that is only perpetuated by maintaining the status quo. These rules are the status quo and have been for over a decade. Over this decade, the movie studios have gained power and the small producer has been excluded. It is time to upset the status quo; it is time for a change. On this issue, the network position represents change—a chance to abandon over a decade of the status quo that has not benefited minority producers and performers. It also represents change that could help assure better television service to those who don't have or can't afford the new services. Change can only help Blacks and other minorities—thus NBMC firmly supports changing these rules by repealling them and allowing the networks to compete fairly.

Mr. Chairman, that concludes my remarks. However, in order that the Committee may have the benefit of the views of other minority representatives who share NBMC's position, I would like to offer for the record the comments and testimony of those persons as they appeared before the FCC in March of this year. Thank you.

Senator GOLDWATER. Thank you very much.

Mr. Clayman?

Mr. CLAYMAN. Mr. Chairman and members of the committee, the National Council of Senior Citizens normally does not get involved in the intramural conflicts between giant corporations trying to determine the boundaries of their interests, of that turf, but where such titanic quarrels may affect the lives and happiness of the elderly we represent, we do have the temerity to get involved.

Now, let me try in a couple of minutes to explain how our people are affected. Elderly people are more homebound than the younger generations. They more often live alone, and loneliness plagues the latter years of their lives. That fact explains why senior citizens are more avid television viewers, why they rely on the news, the education programs, the entertainment and the sports which flow from TV.

Indeed, for them, television is their lifeline to the mainstream of life, their window to the essential realities of the world outside the confines of their homes, and their television is free TV, networks. That fact has to be seen. They do not go to pay TV, simply because they cannot afford pay TV, many millions of them. And so, as you consider today and hereafter what may be done in this field, please put that basic economic fact of life in your memory.

I would urge that at least half the population of our country is unable to absorb cable TV or pay TV. Those are simply beyond their means.

Our expectation is, our fear is that if pay TV or free TV is unable to sustain the kind of profit structure which makes it possible for them to continue at least on the level they are at now or better, to move into the homes of the general public, including the poor elderly, the people I am talking about, mainly women then they will be adversely affected. They are relatively old, some of them afflicted by some long duration sickness, and as I say, this—TV—is their association with many elements of reality in our society.

If TV becomes controlled in fact by pay TV, we are going to impose a great unhappiness on senior citizens. Substantially, no matter how many words I use, substantially that is the picture. And I would trust that this element in our society, which is a growing element, be in your memories as well as all other elements of our society.

I noticed the other day a statistic that is shocking to me, and that statistic is that between 1981 and 1982, 2.6 million people in our country fell into poverty, 2,600,000 new folks who fell into the poverty ranks. Obviously, those people cannot afford pay TV, and so it seems to me that while the problem is a difficult one, if there are any prejudices at all that will be expressed by this committee, my hope is that prejudice will fall on the side of maintaining free TV, and I thank you for this opportunity.

[The statement follows:]

STATEMENT OF JACOB CLAYMAN, PRESIDENT, NATIONAL COUNCIL OF SENIOR CITIZENS

My name is Jacob Clayman and I am President of the National Council of Senior Citizens. The National Council is a membership organization which represents over four and one-half million older persons through over 4,500 clubs throughout the

United States. I am here today to present the National Council's plea for free quality television and, therefore, for rejection of S. 1707.

The majority of our members are of modest means. They are living on fixed incomes and have very little money to spare after paying for rent, health care, energy and food. Indeed, many must rely on their Social Security check as their only source of income and can barely cover their most basic needs. Moreover, our members tend to be more homebound than younger people. They also tend to be more worried about their safety when they venture outside their homes.

For these millions of Americans, free television plays a critical role in their lives. It provides entertainment, information, and education. It is their window to the world. And the fact that it is *free* is critical. We are, therefore, anxious to see that free quality programming is protected for senior citizens and for all Americans.

We believe that the Financial Interest and Syndication Rules unjustifiably operate to the advantage of the pay services and to the detriment of free television. They handicap and free broadcast networks in their ability to compete with the pay media for quality talent and programing. Our members and the general public would suffer if better programming goes only to those who can afford the monthly costs for cable services.

Original programming of series and movies for the pay services has already increased dramatically. Cable services now exhibit extensive and diverse series, including sitcoms, soap operas, and cultural, musical and religious programs. The involvement of the pay services in the production of movies is also extensive.

This shift in relative programming strength away from free television to the pay services would not affect only entertainment programming. We are concerned that if advertisers follow affluent audiences to the pay services, less revenue will remain not for entertainment programming, but also for the news, information, sports and public affairs programming that is so important to senior citizens and to the general public. The overall quality and diversity of free television, therefore, may suffer by operation of the Rules.

The financial status of the elderly has been deteriorating in recent years. Federal budget cuts in Medicare, Medicaid, Food Stamps, Energy Assistance, Supplemental Security Income, and other valuable income-aid programs that many elderly rely upon have meant a real decrease in the purchasing power of older people. Additional Fiscal Year 1984 budget cuts proposed for these programs and the delay in the Social Security cost-of-living adjustment will further erode the buying power of the elderly. The result is that fewer and fewer senior citizens have enough discretionary income to afford services such as pay television.

The continued existence of the Rules—which are government-imposed restrictions only on the free television networks—may mean that free broadcast networks cannot compete as effectively with the pay services in the acquisition and distribution of quality programming. There is no valid reason for the government to favor pay over free television. Yet this is precisely what the Rules do; and what S. 1707 would do. I urge you to consider the interests of senior citizens and the general public in quality free television and that S. 1707 is contrary to the public interest.

Thank you.

Senator GOLDWATER. Mr. Kehoe?

Mr. KEHOE. Thank you, Mr. Chairman.

On behalf of the American Legal Foundation, I would like to thank this committee for the opportunity to testify here today. I think the testimony that has been given illustrates several important points. The first of these points is that reasonable minds can and have differed on the merits of the financial interest and syndication rules. There has been disagreement among independent television stations, disagreement among network affiliates, disagreement among minority groups, and also disagreement among public interest groups.

About the only two groups that are in agreement on either side are the networks who favor serving their financial interests and the existing producers who favor serving their financial interests.

I think what this illustrates is that there has been no conclusive proof one way or the other that these rules serve the purpose they were intended to serve, and that is the public interest in having a

diversity of programing. In view of this fact, I think it very significant that what is proposed in S. 1707 is to retain rules which constrain marketplace forces when the agency which promulgated those rules has concluded first in a network inquiry and now in a rulemaking that the rules serve no useful purpose.

If that conclusion is correct, then there can be no call for delaying the deletion of those rules.

I would like to also address the effect the financial interest rule has had, in my view, on preventing an increase in diversity of programing. In my view, and in the view of the American Legal Foundation, the financial interest rule has kept new entrants from the marketplace who could help give seed money for the financing of new programing. We believe that this is a very unfortunate effect of the rule, and that there is no countervailing benefit that would offset this effect.

I think the most telling point that has been made during these hearings in favor of the retention of the financial interest and syndication rules is one made by a gentleman testifying on behalf of an independent television station.

He said, if I recall correctly, that a syndicator would realize that the network which owned a passive interest in a program that he was syndicating, would also in the future be deciding whether or not to select him as a syndicator. This syndicator would be tempted because of that passive interest to favor that particular network over an independent station. If syndicators act that way, and I do not think it would be in their financial interest to act that way, I think it is much more likely that the independent station would be favored over the particular network's true competitors, the other two networks.

I would like to thank the committee once again.

Senator GOLDWATER. Mr. Campbell.

Mr. CAMPBELL. Mr. Chairman, members of the committee, my name is Kevin Brian Campbell. I am a legislative advocate for the United Brotherhood of Carpenters and Joiners of America. I am here today for our general president, Patrick J. Campbell, to speak on behalf of our 700,000 members in opposition to S. 1707.

Members of the Carpenters Union and their families, like working men and women throughout this country, rely on free television to provide entertainment as well as information and education. In these times of continued high unemployment and economic hardship for workers throughout America, few of our members have the means to pay for the television viewing. The pay services therefore are not realistic alternatives to the free television networks for many Americans.

However, we are afraid that the quality and diversity of free television programing is being jeopardized by the continued existence of the financial interest and syndication rules. We understand that the rules restrict the free networks in the program purchasing marketplace by limiting the amount of money they can pay for programs. However, no restrictions are placed on the pay services. These competitors of the free broadcast networks can bid large amounts for programs because they can also buy these additional rights.

As a result of this Government-imposed restriction on free networks only, the pay services have an advantage in the program marketplace. If allowed to continue, it will cause more and more programs to be bid away from free television service. These programs will then be available only to those who can afford to pay to see them. Many of our members, however, have very little discretionary income, and they must rely on the present commercial broadcast system. This is especially true of our retired members.

As you had mentioned before, Mr. Chairman, the reduction in profits to HBO of 22 percent this year may also reflect hardships in the amount of money that is not circulating in the economy as we would all like it to circulate. Even with that, it might be also that many of the people that we represent also have a large reduction in the amount of funds that they have available to them, and even more than we might be estimating, even more might not be able to afford pay TV.

Yet it is not enough of a drop that HBO is not able to go out and purchase movies like "Trading Places," "48 Hours," "Annie," and "Flashdance," which will all be viewed on HBO only next year. We have also begun to see this movement of programs away from free television such as sporting events. In 1982, there were 10 title fights alone that were to be viewed only on HBO and not free television, and in 1983 we will see 5 title fights and as many as 221 basketball games.

All these have already moved out of the free television area into pay television. Many entertainment series as well as educational and religious programs are being developed for pay and exhibited exclusively on pay services.

Finally, we have seen an enormous growth in for pay television movies. The continued existence of the rules, therefore, threatens the overall quality and diversity of free television programming.

Another reason why the carpenters union opposes S. 1707 in the rules is that while the government regulates free television in regard to program content and affirmative action, which the labor movement generally supports, the pay services are largely unregulated. Through operation of the rules, the Government discriminates in favor of the unregulated pay services to the disadvantage of the regulated free media and to the detriment of the viewers of free television.

Finally, the Carpenters Union, indeed, the whole labor movement, opposes the preferential treatment given by the Government through operation of the rules to the basically nonunion pay television industry at the expense of the unionized free television networks. Pay services are not only nonunion, but have shown that they are intent on remaining that way. This is evidenced by a recent battle the stagehands had with Group W Cable in Los Angeles.

We believe that this is inappropriate in times of continued high unemployment and economic hardship for many American workers for the Government to subsidize a segment of the television industry which the public must pay for at the expense of the segment of the television industry which is free.

The damage done to the free television system hurts millions of Americans who cannot afford to pay for the entertainment, news,

information, sports, and public affairs programing that is so important to all Americans. For all these reasons, the carpenters union urges that this committee will stand in opposition to S. 1707.

Thank you.

Senator GOLDWATER. Well, thank you very, very much, Mr. Campbell. And I understand from the chairman of the full committee that he has no questions. I have no questions. And because Senator Wilson is not a member of the committee, and we both have to leave for other business, and we have nobody to leave in command of the committee, I want to thank all of you. You brought up some very, very good points. Frankly, they are points that I would like to see brought up, I would like to see us have a very, very thorough discussion on this whole subject.

I happen to live in a part of this country that is very heavily populated by what I call paisanos, and I think there are parts of this country where there are many, many blacks. I come from a part of the country that has old people, and I am kind of old myself. Mr. Kehoe, I am not a lawyer so it is hard for me to follow lawyers, but some day I am going to impose upon our chairman to hold a hearing on just what is wrong with American television.

And I have to tell you, I think there is a lot wrong, but that further study does not apply to the retention or not of the rules we are talking about.

I want to thank all of you for being with us. It has been a real pleasure to have you. With that, the meeting will be adjourned.

[Whereupon, at 1:48 p.m., the subcommittee was adjourned, to reconvene at the call of the Chair.]

ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

STATEMENT OF THE ASSOCIATION OF NATIONAL ADVERTISERS

Please accept these comments for the record on behalf of the Association of National Advertisers (ANA).

ANA's membership consists of more than 300 leading national advertisers who, in 1982, invested 6.2 billion dollars in network television and 4.3 billion dollars in spot television.

We would like to make two main points today.

1. The Syndication and Financial Interest Rules have enabled independent television stations to grow, resulting in more viewer options and a more competitive television marketplace.

2. The networks do not need income from syndication in order to compete with cable.

Since 1972, independent stations have grown in number from 82 in 46 markets to 179 in 88 markets. Independents' share of viewing in the same period has grown from 5 percent to 16 percent in prime time and from 9 percent to 21 percent overall. Meanwhile, network audience share in prime time has dropped from 95 percent to 79 percent.

The shifts in viewing are not due to the emergence of the "new technologies," but to the availability of first-rate off-newtwork programming available through the Independents.

As the Independents improved their profits and strengths, they banded together and commissioned original high-quality programming from the studios. One result has been a half hour news show delivered by satellite seven days a week to 77 stations with 73 percent coverage.

Clearly, the rules have worked to the advantage of the Independents and the viewers.

The rules have also worked to the advantage of advertisers and the consuming public.

Examination by a number of our members of their costs for spot television in the top 50 markets showed a clear correlation with the strength of Independents.

Where Independents are strongest, spot costs are lowest—a spread of as much as 47.5 index points from the top 10 markets to the lowest 10 when ranked in order of the Independent's share of viewing.

It follows, of course, that higher advertising costs inevitably result in higher costs to the consumer.

What has happened to the price of network time in the past 10 years? Between 1972 and 1982, advertisers have seen network unit costs increase 194 percent, while the consumer price index rose 132 percent during the same period.

It is not surprising that the networks wish to regain the market lost to the Independents. Each rating point lost could mean an annual loss to the networks of as much as 73 million dollars.

The FCC's tentative decision to rescind the Financial Interest/Syndication rules is based in part on the belief that "new technologies" will create a competitive environment and make the rules unnecessary.

To date, however, advertiser-supported, basic cable services have about 2 percent to 3 percent of the audience, while pay services, such as HBO, have about 5 percent.

This is not likely to change in the near future. Experienced companies are failing in cable. It has been reported that they're invested and lost millions of dollars:

CBS Arts Channel—$30 million.

Rockefeller Center—$34 million.

ABC/Westinghouse Satellite News—$40 million.

In conclusion, the existing FCC Financial Interest and Syndication Rules are keeping the Independents healthy and, as intended, are giving the viewer more options while creating a more competitive marketplace. Furthermore, the networks are not losing significant share of audience to the cable systems and do not need more revenue to compete.

In short, the rules are working. If it ain't broke, why fix it?

While the "new technologies" may, in time, reduce concentration in the television advertising market, there is little reason to believe it will occur in the near term future. For these reasons, we strongly support S. 1707.

HILL/MANDELKER FILMS,
Beverly Hills, Calif., January 17, 1984.

Chairman BARRY GOLDWATER,
Communications Subcommittee, Senate Commerce Committee, Washington, D.C.

DEAR SENATOR GOLDWATER: Pursuant to your request for additional information, below, for the record, are answers to those questions specifically addressed to me:

(1) The networks claim that they face declining market shares but incur program costs which have been rising at a higher rate than revenues. They say the obvious result is a profit squeeze which will prevent free television from providing the public with quality and diversity in programming. They reason the networks must have the same opportunity to negotiate for after-network participations that their principal competitors have. What do you think of this argument?

The networks argument that they are suffering a profit squeeze which will result in diminished quality and diversity in free television broadcasting is wholly specious. The declining network market share is not the result of the so called new technologies but is largely the result of a growth in independent commercial stations.[1] The growth in independent stations inherently improves diversity in programming despite the networks effort to claim otherwise.

Perhaps the most troubling aspect of the networks argument is the suggestion that they simply seek the "opportunity to negotiate". No program supplier, no matter how large, can negotiate with the network. There are hundreds of program suppliers and only three broadcasting networks. The networks have an inherently advantaged position which, in the absence of regulation, would lead to anti-competitive behavior. They are the gatekeepers. There are only three theatres. I am either on their air or out of my business.

Though the networks would claim the current regulations are burdensome, the network profit statements suggest otherwise. Even the least successful network is able to turn a profit.[2] Over the past decade the networks have squandered the profits derived from broadcasting by investing in almost everything but quality programming. They have bought amusement parks, invested in cable systems, financed real estate—all with the profits derived from broadcasting. There is no reason to believe that additional revenues that would accrue to the networks in a deregulated climate would be invested in programming.

In advancing the case for deregulation the networks are not arguing for greater quality and diversity of programming. They are arguing for the maintenance of their monopoly. They fully understand that deregulation would be the death of the independent station. They are cheered by the prospect that deregulation would erode the vitality of the independent producer. As a small independent program supplier, I know that the only guarantee of my future lies in the continuation of a competitive climate through the maintenance and strengthening of the current regulations.

(2) The FCC, in its Tentative Decision, did not appear concerned with any programming other than prime-time series. Does the fact that the FCC's Tentative Decision permits the networks to syndicate mini-series, movies or specials create problems for small producers?

Definitely. Unlike the major studies, which frequently produce numerous series, specials and movies for a given season, my resources are limited. Movies of the Week have been the mainstay of Hill-Mandelker Films. Foreign and domestic syndication of such productions are crucial—that is how we recover our original investment, and hopefully, make a profit. Because syndication sales of our movies or specials cannot compare with the prices obtained for off-network syndicated series, decisionmakers tend to forget that such syndication is very important to the small producer. Unfortunately, we do not have the clout to refuse network demands for

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[1] Nielson industry figures demonstrate that in 1980 the networks secured an 82 percent share, independent stations a 15 percent share, and all cable and new technologies combines, captured a 3 percent share.

[2] In 1982, NBC reported a 107 million dollar profit despite finishing a distant third in a three horse race.

syndication rights. To permit network syndication of our movies and specials will eliminate small, struggling producers, with a simple stroke of the bureaucratic pen.

(3) You seem to have maintained your independence—you are allied neither with a major producer nor a network. What financing options does a small producer such as Hill/Mandelker have?

There are a veritable galaxy of financing options available to the small producer. We can negotiate financing, on either an overall or a project-by-project basis, from major studios (e.g., Paramount, Universal), large independents (e.g., MTM, Lorimar), syndication companies (e.g., Viacom, Worldvision), or from the banks. The financing market is a vital, open and competitive market.

By granting the networks the right to negotiate for financial interest or syndication, the government would inadvertently destroy the myriad financing options which now exist for the small producer. The networks would not enter the financing marketplace, they would trample it.

Yours sincerely,

LEONARD HILL.

MTM,
February 6, 1984.

Chairman BARRY GOLDWATER,
Communications Subcommittee, Senate Commerce Committee, Washington, D.C.

DEAR SENATOR GOLDWATER: Pursuant to your request for additional information, below for the record, are answers to those questions specifically addressed to me.

1. Some people claim that in the second or third year of a successful program, the producer can invariably negotiate the network license fee to increase its own profit on the show. Is this a fair representation of actual practice?

No it is not. First, MTM does not make any profit from the network license fee. In fact, our costs always exceed the license fee, thus causing us to "deficit finance" programs each week they are in production. Our losses accumulate rapidly—future syndication revenues provide the only hope that such deficits will be recovered. While we may, at times, negotiate an increase in the license fee, such an increase is merely an attempt to keep pace with rapidly escalating star and production costs.

In fact, it is extremely rare for a network to cover the full cost of production. A more typical example of a popular program in which the networks do not cover the full costs of production is "Hill Street Blues." During the 1982/83 season, which was the third year of "Hill Street Blues," MTM spent approximately $865,000 to produce each one-hour episode. The license fee from NBC that season for the program was $800,000 per episode, resulting in a $65,000 per episode deficit.

Having produced 22 episodes for one season of "Hill Street Blues," MTM invested $1,437,000 beyond that recouped from network license fees. The deficits incurred last season, when added to those incurred during the first two seasons, brought MTM's total current deficit on the series to approximately $3,230,000.

MTM needs approximately 100 episodes of "Hill Street Blues" before the show can become a viable commodity in the syndication market. As of last season MTM had completed approximately 60 episodes. By the time MTM accumulates 100 episodes, its production deficit will be in excess of $6 million. Producers invest a substantial amount of money over and above the network license fee to insure the highest quality program possible. If the program does not accumulate a sufficient number of episodes to become a viable commodity in the syndication market, due to network cancellation, the producer has simply forfeited the amount invested in excess of the license fee. And if the producer is denied the benefits of syndication after the network run, shows such as "Hill Street Blues," "St. Elsewhere," and "Lou Grant" could not be produced.

2. Do you think networks will negotiate for syndication rights or a financial interest under the proposed rules or will networks be able to simply extract the maximum permissible rights as the price of getting a program on the air?

If the Financial Interest and Syndication rules are repealed, networks will have the leverage, as they did prior to the rules, to demand significant rights from even the most powerful producers. Although you might expect MTM to have some degree of parity with the networks due to MTM's record of producing high-quality shows, in reality, we have little clout at the bargaining table. It is important to realize that at the point in time when syndication and financial interest rights are negotiated, the producer is most vulnerable. For a show to acquire any value, it must be accepted by a network. It must get into the network theatre. There are simply no alternatives. Even though the producer may have had numerous prior hits, a new show is always an unknown quantity with no guarantee of success. Networks can simply demand significant rights as the price of putting a show on the air.

A program must get on a network and stay on the air for approximately five years before it acquires syndication value. Thus, the networks have total control over the ultimate syndication value of a program. Because of that inherent power, they can demand significant concessions from even the most successful producers. The inequity in bargaining power between network and producer is inherent in the television marketplace. If MTM wants to be on a network, it will have to accept the network terms which the network will exact to its maximum benefit. The rules are the only available counterweight to unlimited network leverage and power in the program production and exhibition area.

3. Will cable or HBO regularly acquire programming that is suitable for syndication?

The pay television industry has not created such changed circumstances as to justify modification of the rules. Although there is more talk recently of creating original programming for pay television, and indeed, some limited amount of original programming has been produced, the amount of money available from pay services is far below what the networks spend due to their enormous audiences which generate billions of dollars of advertising revenues per year. Budgets for those few programs which have been produced for cable are usually a mere fraction of typical network production budgets. Those series which have been ordered for cable are usually for a limited run. For example, Showtime ordered 12 episodes of "The Paper Chase," a revived network show, for the coming year following a small order for new episodes last year. The budget for these shows—unusually high by pay TV standards—was less than 80 percent of the previous network budget. Clearly, producers cannot now, nor in the foreseeable future, contemplate significant production of high quality, expensive programs such as "M.A.S.H." or "Hill Street Blues" or "St. Elsewhere" for pay television.

Please forgive my delay in responding to your questions, however, I have been out of town during the last several weeks and I was unable to attend to this response before today. I hope my delay has not caused you any inconvenience.

Very truly yours,

MEL D. BLUMENTHAL,
Executive Vice President.

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